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[1] May be found in the files of the subcommittee.

Item No. 1008-D Y 96-2: S.rp. 1011

96th Congress } SENATE { Report
2d Session } { No. 96-1011

BUREAU OF ENGRAVING AND PRINTING

APPEARANCES OF CONFLICT OF INTEREST AND IMPROPER CONDUCT BY EMPLOYEES

COMPLETED
ORIGINAL

REPORT

OF THE

COMMITTEE ON GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

MADE BY ITS

PERMANENT SUBCOMMITTEE ON INVESTIGATIONS

October 1 (legislative day, June 12), 1980.—Ordered to be printed

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96TH CONGRESS } SENATE { REPORT
2d Session } { No. 96-1011

BUREAU OF ENGRAVING AND PRINTING—APPEARANCES OF CONFLICT OF INTEREST AND IMPROPER CONDUCT BY EMPLOYEES

OCTOBER 1 (legislative day, JUNE 12), 1980.—Ordered to be printed

Mr. NUNN, from the Committee on Governmental Affairs, submitted the following

REPORT

I. INTRODUCTION

In May 1978, certain employees of the Bureau of Engraving and Printing ("BEP" or "the Bureau") contacted the Subcommittee staff on a confidential basis and identified a number of instances of alleged mismanagement and inefficiency in operations of the Bureau. The Bureau is the part of the Department of Treasury which is responsible for producing U.S. currency, postage stamps, food coupons, and other financial instruments issued by the Government. Its business is manufacturing products, not making policy.

Most of the allegations dealt with the business relationship between the American Bank Note Company ("ABN") and BEP. The ABN is headquartered in New York City and has subsidiaries in Canada and England. It is one of the largest printers of financial instruments in the world, producing the currency of 70 foreign nations, as well as stock certificates, travelers checks and other security items. It has also printed food coupons and gasoline ration coupons for BEP. ABN also offers for sale machinery used in the production and handling of currency, including printing presses and counterfeit detection equipment.

The sources said, among other things, that BEP had failed to conduct timely audits of food coupon contracts let to ABN and that a September 1977 internal BEP audit, conducted 6 years after the first contract was awarded, determined that the profit ratios on certain contracts were much higher than the ratios which BEP contemplated when it made the awards. The sources also said that the Magna Currency printing presses acquired from ABN had never operated satisfactorily. They also pointed out that James Conlon had gone to work for ABN immediately upon his retirement as Director of BEP.

The Subcommittee initiated a preliminary inquiry on May 16, 1978 pursuant to its authority under Section 3(1) of Senate Resolution 370 (95th Congress, Second Session) to investigate the efficiency and economy of all branches of Government, including the possible existence of mismanagement, conflict of interest, unethical and improper practices in the activities of the Government and Government employees.

After a year long staff investigation, the Subcommittee held 3 days of public hearings on May 1, 2, and 3, 1979. Twenty witnesses were examined under oath, including Subcommittee staff members who had participated in the investigation. The record also includes several sworn affidavits and numerous documents. The printed hearing record covers 569 pages. Subsequent to the printing of the record, the Subcommittee received a supplemental submission from James Conlon, which has been made Appendix A of the report. Additional communications were also received from the Department of Treasury which have been made Appendix B to the report.

The members of the Subcommittee staff who participated in this investigation were Philip Manuel, Walter Fialkewicz, John Walsh, all former investigators of the Majority staff; Peter Sullivan, Assistant Counsel; W. P. Goodwin, Jr., Staff Director; Joseph G. Block, Chief Counsel to the Minority; Chuck Berk, General Counsel to the Minority; and Arthur Rose, formerly of the Minority Staff. The investigation was conducted under the overall supervision of Owen Malone, former Chief Counsel; LaVern J. Duffy, General Counsel; and former Chief Counsel to the Minority, Stuart Statler.

The Subcommittee's hearings focused primarily on conflict of interest questions raised by James Conlon's dealings with ABN before he retired from BEP and went to work for ABN. The Subcommittee also heard evidence which raised similar questions about the conduct of Richard Sennett, BEP's former Assistant Director for Research and Engineering who also went to work for Conlon at ABN. The inquiry centered on official actions affecting ABN which Conlon and Sennett may have taken while they were discussing or had an arrangement with respect to employment with ABN.

A Government employee acting in his official capacity is held to strict standards. He is prohibited by criminal statute from participating personally and substantially in any matter in which an organization with whom he is negotiating, or has an arrangement with respect to prospective employment, has a financial interest. Government conduct regulations also prohibit any action, whether or not specifically prohibited, which might result in or create an appearance of a conflict of interest or other impropriety. Such an "appearance" occurs when a Government official engages in conduct which outwardly seems to be a violation of law or other impropriety cited in the regulations.

The major portion of this report is devoted to an examination of Conlon's conduct as Director of BEP in the period November 1976 to the time of his retirement from BEP on July 1, 1977 and commencement of employment with ABN the following day. In November 1976, Conlon received an offer of employment from ABN which he said he immediately rejected and thereupon, discussion of prospective employment with ABN was terminated. However, he did acknowledge receiving and accepting an unsolicited oral offer of employment from ABN on June 10, 1977, which was formalized in a written agreement executed on June 27, 1977.

From November 1976 to February 1977, Conlon selected and contributed significantly to the design of the office space for ABN, which he later occupied after becoming an ABN employee. These activities, as well as some testimonial evidence, created an appearance that Conlon had some understanding concerning employment with ABN prior to June 10, 1977.

During the period November 1976 through June 1977, Conlon took a number of official actions with respect to an anticounterfeit system which ABN proposed to sell to the Government. The proposal involved a potential initial outlay of about $14 million for currency paper treatment equipment to be used by BEP, plus additional expenditures for sensors to be used by Federal Reserve banks. Certain of these actions were taken even after Conlon had reached an oral agreement with ABN on June 10.

The report discusses the conduct of Conlon and Sennett in light of relevant statutory and regulatory criteria and assesses the adequacy of existing rules for preventing conflicts of interest and appearances of such conflicts.

The Subcommittee's hearings also addressed deficiencies in BEP's procurement practices and other problems in its operations. These matters are also discussed in the report.

The results of the Subcommittee's investigation are discussed in the following sections.

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II. APPEARANCES OF CONFLICT OF INTEREST AND IMPROPER CONDUCT: THE CASE OF JAMES CONLON

A. Background

On January 4, 1942, James Conlon began his career as an apprentice printer in the Bureau of Engraving and Printing of the Department of Treasury. Over the years he rose through the Bureau's ranks and on October 9, 1967, was made Director, the highest position in the Bureau. He served as Director for almost 10 years. As Director he enjoyed a large measure of autonomy and operated the Bureau with little supervision from main Treasury. During that time he gained an international reputation for his technical ability in the field of intaglio printing, the unique process employed to protect United States currency against counterfeiting.

Conlon became eligible for retirement from the Government on February 21, 1976 (p. 416).[1] By November or December 1976, Conlon was considering his retirement plans (p. 424). Because of his age, 56 years, he believed that, in order to do anything productive in the private sector, he would have to make his move within a year or so (p. 424). Extending his Government service any further was also economically unattractive in view of Government pay ceilings (pp. 63, 226, 227). In light of Conlon's background and expertise, post-retirement employment with a firm in the security printing and equipment manufacturing field was a distinct possibility (pp. 424, 432, 433). Of the few firms in this field, ABN was one of the world's leaders.

ABN is the only firm in the United States which produces currency.[2] Historically, ABN and BEP have had a close relationship because of their common interest in protecting national currencies and other security documents from counterfeiting. In addition, ABN had developed a substantial business relationship with BEP. Beginning in 1971, ABN produced food coupons for BEP and had made attractive profits (p. 527). In 1974 BEP awarded to ABN a contract to purchase four Magna printing presses which are used in the production of U.S. currency. By 1976 ABN was BEP's leading private contractor in terms of dollar volume of business (p. 427). In addition, from 1976 to 1978, BEP was actively engaged in discussions with ABN concerning an anticounterfeit system ABN proposed to sell BEP and the Federal Reserve Board.

The mutual professional interest and business relationship between BEP and ABN engendered frequent contacts between BEP and ABN personnel. Conlon, prior to his retirement from BEP and joining

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[1] Unless otherwise indicated, page numbers in parentheses refers to the pages of the printed record of the Subcommittee's hearings entitled "Bureau of Engraving and Printing."

[2] ABN's chief competitor is the Thomas DeLaRue Company, Ltd., of London, which like ABN, prints currencies of foreign nations. Also, one of DeLaRue's subsidiaries has been a major supplier of BEP's printing presses.

ABN, met frequently with ABN officials and on many of such occasions, ABN paid for lunch or dinners of Conlon and other BEP employees (pp. 232, 475).[3] Conlon developed a cordial relationship with Edward Weitzen, the Chairman of the Board of ABN.

On July 1, 1977, James Conlon retired from the Bureau. The following day he assumed his new position as President of ABN Development Corporation, a subsidiary of ABN with offices located in Crystal City, Arlington, Virginia. Conlon's employment contract specified an annual salary of $85,000 for 5 years, and an option to extend the term an additional 5 years, plus pension and other fringe benefits. Conlon was also instrumental in securing employment at ABN Development for his secretary of 10 years at the Bureau, Mary Catherine Kirk, and for his associate of 13 years at the Bureau Richard Sennett, the Bureau's Assistant Director of Research and Engineering.

The following sections discuss the evidence concerning Conlon's conduct as Director of BEP during the 7 months prior to joining ABN's subsidiary, including his employment discussions with ABN in November 1976 and June 1977; the assistance he gave ABN during the period November 1976 to February 1977 in the selection and design of office spaces; and his official involvement from November 1976 to his retirement in the proposed acquisition from ABN of anti-counterfeit equipment known as the Security Signature System. Section B summarizes the evidence concerning the timing and nature of discussions and understandings Conlon had with respect to employment with ABN while he was Director of BEP. Section C summarizes the evidence as to the timing and nature of official actions Conlon took as Director of BEP which affected ABN.[4]

B. CONLON'S EMPLOYMENT DISCUSSIONS WITH ABN

1. ABN'S NOVEMBER 1976 JOB OFFER TO CONLON

According to Conlon and Weitzen, sometime in November, 1976, in Conlon's BEP office, Weitzen offered Conlon the position of President of ABN, to replace the then President, William Barrett, who was retiring in December (pp. 420, 503–504). It also appears that this offer was prompted by Weitzen's concern that Thomas DeLaRue Co. Ltd., ABN's only real competitor, might have offered Conlon a job. Conlon had met Sir Arthur Norman of DeLaRue on November 13 for the first time (p. 424).[5] Although both men placed the time of the offer in "early November," neither could specify a date. However, Conlon said that the offer was made on the occasion of Weitzen's first visit to BEP to discuss the Security Signature System ("SSS") (p. 419). Weitzen's ABN expense account vouchers covering the period November 1 through November 30, 1976, shows that November 18 was the only date in this period that Weitzen was in Washington, D.C.[6] Thus, it appears more likely that Weitzen made the offer to Conlon on November 18, rather than in earlier November.

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[3] The staff estimated the value of lunches, dinners and other expenses incurred on about 57 occasions by ABN for Conlon at about $1,400 from 1971 to the time of his retirement on July 1, 1977. According to Conlon's estimate, ABN spent an average of about $107 per year for seven years on his behalf for such expenses. Conlon's estimate understates the amounts attributable to him because it is an average reflecting the total ABN expenses incurred for all BEP employees divided by number of employees.

[4] The conduct of Richard Sennett is discussed in Part IV.

[5] Weitzen said in a pre-hearing interview by the Subcommittee staff that this was an important factor in making the November offer to Conlon (p. 62). However, at the hearing, Weitzen said he thought the Conlon-Norman meeting was in April or May and was a factor in his June offer, rather than the November offer (pp. 507–509). Since the first (and apparently only) Conlon-Norman meeting clearly occurred on November 13, it appears that Weitzen's recollection at the hearing was incorrect, and Weitzen acknowledged that he "may very well have been mistaken about the time. But there is no question of my concern about his going with the DeLaRue Co., whether it was in November or the following spring" (p. 513). In a sworn affidavit, Sir Arthur Norman denied that the DeLaRue firm had ever offered Conlon a job or had ever contemplated making such an offer (exhibit 7–11; p. 78).

Both Conlon and Weitzen testified that, Conlon immediately rejected the offer, said he was flattered, but had a number of things which he wanted to accomplish before retiring from BEP (pp. 518, 523). Conlon told the Subcommittee that the matters he wished to accomplish included securing a new facility for BEP; implementing his objective of producing the first tagged currency by September 1977:[7] and honoring commitments for public appearances and speeches through September 1977 (pp. 408, 409, 423).

Both Conlon and Weitzen said that the conversation was short, and details such as salary were not discussed. However, Conlon was aware that the ABN President's salary was more than twice his salary as Director of BEP.

Mary Catherine Kirk, Conlon's secretary at BEP and now his office manager at ABN Development Corp., testified that in November 1976, Conlon told her Weitzen had offered him the presidency of ABN but told Weitzen he was not interested because he was not ready to retire. She further recalled Conlon saying that he was not interested in going to work in New York (p. 489). However, Weitzen testified that the subject of New York did not come up in his discussion with Conlon of the November 1976 offer, but both Conlon and Weitzen acknowledged that it was a subject of discussion in June 1977 (pp. 422, 504–505).

Conlon and Weitzen said the offer was not left open (pp. 420, 506–507). They pointed out that the specific job offered was filled later, when Salvatore D'Amato, a long-time ABN employee, was appointed President of ABN sometime in March 1977 (p. 505). Weitzen said he did not indicate to Conlon, even by "innuendo," that he had an open door to employment with ABN (pp. 503–507).

Conlon and Weitzen testified that there were no further discussions of possible employment until June 10, 1977, which was well after Conlon made his June 2 announcement of his decision to retire from BEP (pp. 423, 512).

2. CONLON'S DECISION TO RETIRE FROM THE BUREAU OF ENGRAVING AND PRINTING

Conlon said he made his decision to retire from the Bureau on June 2, 1977 (p. 421). He characterized his decision as "spontaneous", and said it was prompted by a meeting he had with Under Secretary of the Treasury, Bette Anderson, and others about a proposal for a new Bureau facility. Conlon said he was upset by a suggestion made that the new facility should be located somewhere in the Midwest (p. 421). After the meeting, Conlon said he notified Under Secretary Anderson that he would retire on July 1 and confirmed his notice in writing later the same day (pp. 135, 324, 332, 421, 422, exhibit 7–39). Within a few days Conlon said he announced his retirement decision to the BEP staff and, "in a matter of days afterward," Weitzen telephoned him that he heard of his announcement through ABN personnel working in BEP and asked for a meeting to discuss prospective employment with ABN (pp. 422, 518). They agreed to meet on June 10 in New York.

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[6] The vouchers are contained in Appendix C of the report. In this connection, one entry for November 18 shows that Weitzen took Conlon and Thomas Gainor to lunch. Gainor was the Federal Reserve's representative on the SSS project, which presumably was discussed at this luncheon.

[7] Tagged currency is a reference to sensor detectable material used in connection with the September 1977 anti-counterfeit system.

3. CONLON'S JUNE 10, 1977 EMPLOYMENT DISCUSSION WITH EDWARD WEITZEN OF ABN

Conlon went to New York and stayed overnight. He billed the Government for his transportation and hotel expenses, although he admitted that only his personal employment prospects were discussed (pp. 421, 426, 427, 475, exhibit 7–43). Weitzen treated Conlon to dinner at the Chateau Richelieu restaurant, where they discussed the responsibilities and salary range of the position Weitzen was offering Conlon (pp. 422, 518, exhibit 7–43).

At the June 10 meeting Weitzen told Conlon that the purpose of the position offered was to develop new ABN products, such as inking, impregnation and sensor systems (a reference to anti-counterfeit equipment), and to promote these products with foreign central bank or government printing works people with whom Conlon had good entree (pp. 475, 476, 518). However, according to Weitzen and Conlon, Weitzen said he did not want Conlon to sell any ABN products to BEP, presumably to obviate any conflict problems (pp. 475, 476, 518). Both testified that Colon indicated he was not interested in accepting a position in ABN's offices in New York (pp. 422, 504). It appears that the June 10 discussion centered on a position for Conlon in ABN's new subsidiary, ABN Development Corporation which was establishing an office in Arlington, Va.[8]

Weitzen said he told Conlon the salary would be $80,000 to $85,000 (pp. 523–524). Conlon said reference was made to the ABN President's salary, which he understood to be $85,000 (p. 426).

Conlon also asked Weitzen if ABN would also hire his secretary, Mary Catherine Kirk, and Richard Sennett, BEP's Assistant Director of Research and Engineering (pp. 422, 423). Weitzen said he told Conlon that this was agreeable and that he would be willing to pay them an increment over their current salaries to make it attractive to them. Weitzen felt they would make a "very good team" (p. 524). Conlon said that he asked Kirk and Sennett if they were interested and then called Weitzen to inform him (p. 423). A few days later Weitzen came to BEP to discuss the matter with Kirk and Sennett (pp. 422–423).

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[8] Conlon said he had never heard of ABN Development Corp. prior to June 1977 and is not sure it came up in the June 10 conversation (pp. 456, 493). However, all draft employment contracts for Conlon and those for Kirk and Sennett, the earliest of which were dated June 14, were for positions with ABN Development Corp. (Appendix D) Taking into account (1) the close proximity in time between the June 10 job offer to Conlon and the June 14 draft contracts, (2) Conlon's desire to remain in the Washington area, and (3) the establishment of ABN Development in Washington area offices Conlon helped locate, it would seem probable that the existence of the new subsidiary would have been mentioned in the June 10 conversation.

After his June 10 meeting with Weitzen, Conlon believed he had a definite "oral agreement," or a "virtual agreement" with respect to employment (pp. 421, 426). Conlon said he would have been satisfied with Weitzen's verbal assurance, but wanted to have written confirmation to protect himself in the event Weitzen was "not around 2 years from now." Conlon said it was a matter of refining the terms of the oral agreement reached at the meeting, including the establishment of a 10-year term and precluding relocation outside of the Washington area (p. 421).

Sennett and Kirk confirmed that, on or sometime after June 10, Conlon discussed with them whether they would be interested in leaving BEP to work for ABN (pp. 372, 385, 489, 493). Sometime in the period from about June 15 to June 17, Weitzen visited BEP and met with both Kirk and Sennett who indicated their interest and subsequently received written offers from ABN.

4. FORMALIZING THE DETAILS OF CONLON'S EMPLOYMENT AGREEMENT

Conlon said, on about June 24, he received a written offer of employment with ABN Development Corp. in the form of a letter agreement dated June 22 which had been transmitted by Weitzen via the mail (p. 425). Weitzen's handwritten transmittal note said, "These are drafts I will discuss with you on my return." Included in the mailing were letter agreements for Sennett and Kirk (p. 425). Sennett said he received this offer on June 24 and presumably Kirk did too.[9]

A few days prior to June 21, and well before they signed their contracts, Conlon and Kirk were shopping for furniture for ABN Development's offices which they would later occupy (pp. 381, 459, 494, 495, exhibit 7–49A). On June 23, Conlon called a contractor to make arrangements for decorating these offices (pp. 163, 446, exhibit 7–51A). This evidence persuasively demonstrates that, prior to the time they said they received the formal written offers from ABN, Conlon and Kirk fully intended to work for ABN.

Conlon said he signed his contract on June 27, which is the date of his signature shown in the contract (p. 420). The executed version reflected certain changes he made in the June 22 draft, including the addition of a provision for retirement set at a minimum of $30,000 per year, continued employment in the Washington area for up to a 10-year period[10] and $85,000 salary, rather than the $80,000 stated in the draft (pp. 425–426, exhibits 7–48, 7–57).[11]

5. QUESTIONS CONCERNING CONLON'S AND WEITZEN'S VERSION OF EMPLOYMENT DISCUSSIONS

There is evidence in the record which raises a question whether the discussion concerning prospective employment between ABN and Conlon was definitively terminated in early November 1976 as Conlon and Weitzen had testified: first, the testimony of Thomas Gainor about a conversation he had with Conlon in early December 1976; and second, the involvement of Conlon between November 1976 and February 1977 in determining the location and design of office space that he later occupied after becoming President of ABN Development Co. on July 2, 1977. These matters are discussed in sections 6 and 7.

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[9] According to a letter from ABN received after the Subcommittee hearings, the earliest draft contracts found in ABN's file were dated June 14 (Appendix D). According to testimony of Conlon, Kirk and Sennett, they first received written offers dated June 22 from ABN, but signed revised offers dated June 27.

[10] Both the executed version and the prior offer provided for a term of employment of five years, renewable for additional five years at Conlon's option.

[11] Sennett signed his employment contract on June 28 (Exhibit 7–55, 374). Kirk signed her contract on June 28 (Exhibit 7–56, 489). Their executed contracts, as well as the June 22 drafts, provided for a 5-year term, with options to renew for another 5 years. The executed versions, as did Conlon's, reflected the addition of a provision for continued employment in the Washington area for 10 years.

6. CONLON'S CONVERSATION WITH THOMAS GAINOR

Thomas Gainor is the First Vice President of the Federal Reserve Bank in Minneapolis. From June 1972 through June 1977, he served as Chairman of the Federal Reserve's Subcommittee on Currency and Coin. During Gainor's tenure as the Chairman of that Subcommittee, Conlon and other BEP employees participated in a project involving the development of an authentication system for use in the automatic currency handling equipment (p. 2[illegible]). Gainor and Conlon participated in the evaluation of ABN's anticounterfeit system, the Security Signature System is discussed in more detail in Part II(C)(2) of this report. According to Gainor, he had a conversation with Conlon on December 12, 1976 in which Conlon indicated that he was still considering an offer of employment from ABN.

a. Gainor's Testimony

On December 12, 1976, Conlon flew to Minneapolis for a meeting scheduled the next day about the ABN Signature Security System. Gainor met Conlon at the airport. Gainor testified that, while at the airport, Conlon told him that he was giving consideration to retirement from BEP and he was going to consider several possibilities, one of which was going with ABN, from which he had received an offer (p. 273). Gainor said it was clear that Conlon had not accepted ABN's offer

> * * * because he [Conlon] indicated there were some things he wanted to do at the Bureau before he retired *but I don't recall him saying specifically that he rejected it either* (p. 274). (Italic added.)

In response to a question whether he had the impression that Conlon still had the offer under consideration, Gainor said:

> I treated it as a sort of standing offer. That is the way I interpreted it (p. 274).

Gainor said Conlon made a statement in the course of their conversation which tends to support Gainor's interpretation that Conlon was still entertaining the ABN offer. Gainor testified as follows:

> * * * As I recall the conversation I said something to the effect that if he were representing ABN on this project [the SSS] that would be awkward from our perspective and, *as I remember it, he said if he went to work for ABN, it would be in something completely different from the kind of thing we were involved in here: the SSS* (p. 274). (Italic added.)

Gainor said he considers himself a friend of Conlon, and thought that Conlon was merely filling him in on a development in his career which was of interest to both of them (p. 274). He added that it was not a surprise to him that Conlon mentioned possible retirement because it was common knowledge among personnel connected with central bank and bank note printers that Conlon was then eligible to retire (pp. 274–275).

b. Conlon's Testimony

Conlon's version of the conversation is similar to Gainor's with one major exception: Conlon said Gainor misunderstood if he thought Conlon indicated the offer was still open (p. 424). Conlon explained that it could not be considered a standing offer, because the offer in November was for

> * * * a specific job in which there would be a vacancy at a specific period of time. That was gone. I turned it down, it was obviously in a very short time period and that position did not exist (p. 424).

As pointed out above, Weitzen said the job of President of ABN was not filled until March 1977, when Salvatore D'Amato was appointed to that position.[12] The record also shows that ABN Development Corporation, of which Conlon became President in July 1977, was incorporated on March 9, 1977 (exhibit 7–25; pp. 104–105).

In response to a question by Senator Cohen as to why he informed Gainor about the job offer, Conlon said he wished to inform him as a friend for whom he had high regard as an ethical person and with whom he had worked in the anti-counterfeit project (p. 423). He wanted Gainor to know he had an opportunity to move in the private sector in one of the security manufacturing or equipment areas "so he would not at a later date ever think I had not been straightforward with him" (p. 424). Conlon pointed out that, since there were few companies in this field, "common sense" dictated that ABN would be a possible future employer (pp. 278, 433). Conlon acknowledged that at the time he was considering retirement and, that because of age and other considerations, he would probably have to make his move to the private sector within the next year if he was going to do anything productive (p. 424).

c. Analysis

Even accepting Conlon's testimony that there was no standing offer arrangement for future employment with ABN, he basically acknowledged that future employment with ABN was a distinct possibility given his anticipated retirement a year later; the limited number of companies engaged in the security printing and equipment manufacturing business; and Weitzen's interest in hiring Conlon as the number two man in ABN. Of course, the possibility of employment existed before Weitzen's offer, but the actual offer—even if rejected—gave concrete basis to Conlon's hopes that upon retirement he could secure handsome financial rewards in the private sector. Moreover, at the time the offer was made, Conlon was involved in reviewing ABN's proposal to sell the Government its anti-counterfeit system (discussed in detail in Part II(c)(2)).

Laws and regulations governing ethics of a Government official cannot control private thoughts of an official who contemplates leaving his agency some day and feels some pressure to impress favorably private firms with which he officially deals. In contrast, a very tangible problem is created when a Government official actually receives a job offer from such a firm. Even if the offer is rejected, a question may be raised about the integrity of the official's conduct affecting the offeror subsequent to the offer, unless the official takes appropriate action to insulate himself such as formally notifying his superiors. As discussed in Part II(D)(2) of the report, Conlon did not notify his superiors of this offer.

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[12] In this connection, Conlon said that prior to filling the position, Weitzen asked him his opinion of D'Amato (p. 420).

7. CONLON'S INVOLVEMENT IN LOCATING AND DESIGNING OFFICE SPACE FOR ABN

The Subcommittee also received evidence tending to indicate that, as of late November 1976, Conlon had an understanding with respect to future employment with ABN.

a. Gary Transtrum's Testimony

Gary R. Transtrum was employed by the Charles E. Smith Co. from January 1973 to January 1978. He was responsible for leasing office space in buildings in Washington, D.C. and Virginia.

First Meeting

Transtrum testified that Conlon and his secretary, Mary Catherine Kirk, met with him one week or less prior to November 23, 1976 concerning the leasing of office space at the Crystal Square Building, Number 4, 1745 Jefferson Davis Highway, Arlington, Virginia (Crystal 4), which was then under construction (pp. 237, 240). Transtrum said Conlon wanted to inspect an office that would be available for occupancy within the next several months and that he desired a suite big enough for two executives, two secretaries' offices, a conference room, a work room for a draftsman, a library, and a reception room (p. 240).

Transtrum said, that after generally inspecting Crystal 4, Conlon asked to see an office suite overlooking the Potomac River and National Airport. They then went up to the sixth floor on the east side of the building (p. 240). Transtrum said he paced off an area of approximately 2,400 to 2,700 feet, and then Conlon "showed me the area where he said he wanted his personal office to be located" (pp. 240–241). * * * "We walked off an area approximately 20 feet by 20 feet, and then he showed me where Mrs. Kirk's office was going to be. He showed me where he wanted his library and his executive rest room and where the kitchen would be located" (p. 258). Transtrum further testified that after walking off the total office dimensions, Conlon "then told me that he would be working for American Bank Note Co. as a vice-president and that the American Bank Note Co. would be signing the lease * * *" (p. 241).

Conlon advised that ABN should not be identified on the preliminary office drawings, and that representatives of ABN would contact Transtrum concerning the negotiation of the lease, but that he (Conlon) would select and design the office space (p. 241). Conlon instructed him to send any correspondence to his home in Burke, Virginia (pp. 241–242).

The meeting at the Crystal 4 site lasted about 25 to 40 minutes (p. 241).

In none of Transtrum's contacts with Conlon did Conlon tell him he was the Director of BEP, nor did Transtrum learn this fact until about 3 months prior to his testimony before the Subcommittee (p. 260).

Second Meeting

On November 23, 1976, Conlon met with Transtrum and Jeffrey Ishman, a representative of Deupi and Associates, an office space planner (p. 238; exhibit 16). The meeting lasted about one hour (pp. 238, 242). Conlon brought a sketch of the floor plan of the office and participants discussed the basic office requirements. On the same day, Ishman prepared a preliminary layout which Transtrum mailed to Conlon's home in Burke, Virginia (p. 238; exhibit 16).

In an affidavit, Ishman confirmed that the November 23 meeting took place with a person Transtrum identified as "Mr. Conlon." Ishman said nothing else was mentioned to him to further identify Conlon or what he did for a living (exhibit 16). The Deupi identification sheet for the project lists Charles E. Smith as broker and "Mr. Conlon" as tenant (pp. 262, 265; exhibit 17B).

On examining a sketch of the office layout, Ishman said that he asked what the individual rooms were to be used for and what type and amount of furniture were to go in the rooms, and that Conlon gave him the answers describing each individual room and type and amount of furniture to go in the rooms (exhibit 16). Ishman wrote on the sketch the description and uses of the furniture and the name "Mr. Conlon" (p. 262; exhibits 16, 17C).

Third Meeting

According to Transtrum, a third meeting with Conlon took place in Transtrum's office during the early part of the first week of February. At that time, Conlon returned Ishman's preliminary layout with some minor revisions (pp. 238–239, 259–260). The meeting was very short, about 10 minutes (p. 260). Conlon said he wanted the revisions made before the lease was prepared (p. 259).

Final Contact

Transtrum said his last contact with Conlon was for one or two days prior to February 9, 1977, when he received a phone call from Conlon who requested that a lease on Crystal 4 office space be prepared (pp. 237, 247). Conlon told him that he would not be involved in the negotiations of the lease, which would be handled by a representative of ABN to whom the personal lease should be mailed (p. 247).

Transtrum said he prepared a lease worksheet on February 9, 1977, and on the same day submitted it to his supervisor for approval (pp. 239, 247, 248; exhibit 13). The lease worksheet showed, among other things, that the tenant would be American Bank Note Co. of New York, the nature of business as "securities manufacturer's marketing office," a lease term of 5 years with option to renew for one 5-year term, and the representative as "Mr. Conlon or Mrs. Kirk" (pp. 247, 248; exhibit 13).

Within several days after preparing and submitting the lease worksheet, Transtrum said he received a phone call from Charles Sharkey of ABN, who told him that he got Transtrum's name from Conlon (pp. 239, 249). Sharkey instructed him to send the proposed lease to Sharkey at his ABN office in Philadelphia, which Transtrum did (pp. 239, 249).

On or about March 15, 1977, Transtrum received a phone call concerning the ABN lease from Robert Ivey, counsel to ABN, who said the tenant would be American Bank Note Development Corporation (pp. 249–251; exhibit 14). The certificate of incorporation of ABN Development was signed on March 8, 1977, and filed with the Office of Secretary of State of Delaware on March 9, 1977 (pp. 104–105; exhibit 7–25).

b. Conlon's Modification to the office design in February 1977

Transtrum later received a letter dated March 17, 1977, from Sharkey which transmitted a revised preliminary drawing containing some additional changes made by Conlon in three rooms in the office suite (pp. 239, 252; exhibit 15). These changes included the elimination of a hallway, reversal of the engineering room, the addition of doors and doorways and of lock sets on both access doors to the "President's office," and the identification of telephone and electrical outlets (pp. 239, 252; exhibit 15).

Documents obtained from ABN and testimony from Conlon and Sharkey show that these changes reflected modifications previously made in a handwritten sketch by Conlon (pp. 266–271, 448, 522, exhibit 16). Conlon made the sketch, which contained three references to "President's office," in the latter part of February in his office at a meeting with Sharkey (pp. 269, 454, 455, 522). At that same meeting BEP's Assistant Director for Research and Engineering, Richard Sennett, also made some suggestions in response to Conlon's request for his input as an engineer (p. 381).[13] Conlon's secretary, Mary Catherine Kirk, was also asked at the meeting to give her "woman's view" of the layout and colors (pp. 266, 270, 497).

A lease agreement for the Crystal 4 office suite was executed by ABN Development on April 1, 1977, which provided for a 5-year term beginning May 1 and an option to renew for another 5 years (exhibit 19–8). The contract was later modified to begin August 1 because of, among other things, delays in completion of the office and the lease (exhibits 19–11, 19–14).

These are the offices which Conlon later occupied as President of ABN Development.

c. Conlon's Testimony

Conlon initially denied that he selected or recommended space for ABN's local Washington, D.C. office.[14] However, under subsequent questioning, Conlon admitted his substantial involvement in the location and design of the Crystal 4 office space in the period from November 1976 and February 1977.

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[13] Sennett confirmed that he participated in the February 1977 meeting with Sharkey and Conlon and suggested certain changes in the office design from his engineering point of view, but denied that he had any idea that ABN had made an offer of employment to Conlon, or that Conlon would later occupy the office shown in the drawings (368–369). Sennett said he was not aware that Conlon was going to retire and go to work for ABN until around June 10, which he said was also the first time he was approached (by Conlon) to work for ABN (pp. 369, 373, 385).

[14] Conlon's denials were made in the following exchange:

Senator NUNN. Did you select a space for the future location of ABN's Washington offices?

Mr. CONLON. No, sir, I did not.

Senator NUNN. Who made that decision?

Mr. CONLON. The American Bank Note Co. personnel in New York. I learned at a later date having seen some of the documents at a later date, it was Mr. Robert Ivey.

Senator NUNN. Did you recommend particular space?

Mr. CONLON. No sir. I did not. (p. 429)

Conlon said he became involved in this undertaking as a favor or courtesy to Edward Weitzen and ABN (pp. 390, 431). Conlon said Weitzen asked him to assist ABN in locating the availability of office space in the Washington area for an ABN branch office Weitzen was considering opening. Conlon said the request was made in the latter part of November, after he rejected Weitzen's offer of employment with ABN (p. 438).

Weitzen acknowledged that he asked Conlon to assist in finding office space. He stated that he made the request shortly after, and very close in the time frame to, the rejection of the offer (pp. 505–506).

Both Conlon and Weitzen said the purpose of the proposed office was to provide a local office for ABN's engineers who worked frequently at BEP on the Magna presses and ABN executives, including Weitzen who made frequent trips to Washington (pp. 428, 544).

Conlon testified that Weitzen told him he wanted an office with about 2,000 to 2,500 square feet (p. 428). Conlon said Weitzen then made a sketch for him of the layout which was to include a boss' office, reception room, engineering room, conference room and an entrance (pp. 428, 522).

Conlon said he contacted Weitzen (he did not specify when) to tell him that there was a building in Crystal City that apparently had space and that Weitzen said "thank you, I will get somebody on it" (p. 457). Weitzen testified that Conlon contacted him about the Crystal City office "a few weeks" after making his request for assistance and then he turned the follow-up work over to Charles Sharkey of ABN (p. 517). As noted above, the first indication of Sharkey's involvement was not until February 1977 when Sharkey contacted Transtrum (see p. 19 of the report).

Conlon testified that his actions beyond finding out about the availability of office space were on his own initiative (p. 431).

Conlon acknowledged the first meeting in November with Transtrum and that they and Kirk inspected the Crystal 4 building. However, he denied that he told Transtrum at that time that the Crystal City space would be his office or that he was going to be employed by ABN in any capacity (p. 453). He said he did not even mention ABN in this meeting. He asserted that the first time he identified ABN was at the November 23 meeting with Ishman and Transtrum, and that he told them that the matter would be followed up by ABN's New York people (pp. 453–454, 457).

Transtrum and Kirk agreed that she was always in earshot of Conlon and Transtrum during the November meeting on the sixth floor of Crystal 4 (pp. 257, 491). However, Kirk testified that she is positive that Conlon did not not point out an area on the sixth floor that would be his and Kirk's offices (pp. 491–492). She further testified that she never heard Conlon tell Transtrum that he was going to work for ABN (pp. 493, 495).[25]

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[25] Conlon and Kirk also questioned Transtrum's testimony that Conlon asked for a suite overlooking the airport and the river, noting that the view from the office is obstructed by an office building that was then under construction in November 1976 (p. 495). In point of fact, at the time Conlon first inspected the Crystal City office in November 1976 there was a clear view of the airport and the Potomac River from the sixth floor. In its investigation, the staff determined that the office building which now stands between Crystal Square 4 and the airport and river was in a very early stage of construction.

Conlon admitted that he brought to the November 23 meeting with Transtrum and Ishman a drawing he had made of the office layout. Conlon described his office layout sketch as a "straight line drawing, a straight rule line drawing of the original, very roughly hewed sketch that Mr. Weitzen had shown me in my office" (pp. 245, 454; exhibits 12A, 17C). Since the original Weitzen sketch is not available,[26] it is impossible to tell the extent to which it reflected Weitzen's concept. Other than the Weitzen sketch and estimate of 2,000 to 2,500 square feet of space, Conlon said he received no input from ABN (p. 454). In this regard Weitzen testified that he was not aware of the detail of Conlon's efforts until the time of the hearings (p. 517). Thus it is rather clear that the room layout, including their relative positions and dimensions, reflected Conlon's personal design and not an initiated design. Similarly, the information Conlon gave Ishman concerning the type and amount of furniture to go into each room appears to have reflected his personal concept (p. 262).

Conlon was not asked about the third meeting with Transtrum, but did not dispute in his testimony or supplemental submission that such a meeting occurred. There is no evidence in the record that refutes Transtrum's testimony that such a meeting occurred.

Conlon denied (as Transtrum had testified) that on or before February 9 he asked Transtrum to prepare a lease for the Crystal 4 suite. He also denied he had any discussion with Sharkey about the Crystal 4 office, other than the discussion in February 1977 in Conlon's office, at which time Conlon sketched in the modifications in the office design (p. 455).

Regarding the reference to "President's office" in Conlon's handwritten office sketch given to Sharkey at their February 1977 meeting, Conlon said he did not know who originated this term, noting that it was not used on prior office drawings (pp. 455–456). He said that he used the term "President's office" to designate executive as distinguished from a work area. He denied that he then knew that he was going to become President of ABN Development Corp. (p. 455). He said that he did not know anything about the creation of ABN Development until after his job discussions with Weitzen in June, 1977 (p. 456).

Conlon was asked how he reconciled his prior description of the office as designed primarily for engineers and a place for visiting ABN personnel with the idea of a president's office (pp. 428, 455, 456, 522). Conlon suggested he used the term "President's office" because Weitzen said he wanted someplace to "hang his hat" (p. 456). However, he acknowledged that Weitzen's title was Chairman of the Board of ABN (p. 456).[27]

ABN Development's certificate or authority to do business in Virginia, dated March 31, 1977, lists Edward Weitzen as President of ABN Development (exhibit 19–7). If Conlon had this in mind when he wrote "President's office" on the sketch, it would tend to support his suggestion that he thought it was a reference to the office in which Weitzen would "hang his hat" when he visited Washington. On the other hand, it would also contradict his assertion that he never heard of ABN Development until June 1977.

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[26] No sketch was produced by Conlon in response to the Subcommittee's subpena and, presumably because he did not retain it.

[27] Weitzen said the concept of transforming that branch office into the headquarters of a new subsidiary occurred when ABN formed ABN Development in March 1977 to be a focal point for the development of ABN's new technical products systems (p. 521). As indicated above, Weitzen's testimony supports Conlon's that the offering to Conlon of the presidency of ABN Development did not occur until June 1977.

d. Analysis

Conlon and Kirk took exception to Transtrum's testimony that Conlon told him (1) he [Conlon] was going to work for ABN as a vice-president and (2) where his and Kirk's offices were to be located.

Even if the disputed aspects of Transtrum's testimony are not accepted, Conlon's involvement in the location and design of ABN's Crystal 4 offices created an appearance that he was acting on behalf of ABN in a manner consistent with that of an employee or prospective employee of ABN.

8. QUESTIONS CONCERNING THE TIMING OF CONLON'S DECISION TO RETIRE FROM BEP

The Subcommittee received testimony from Under Secretary of the Treasury Bette Anderson, who was Conlon's superior at the time of Conlon's retirement from BEP. Her testimony conflicts with Conlon's as to timing of his decision to retire, which he said was made on June 2, 1977.

a. Bette Anderson's Testimony

Under Secretary Anderson testified that, during the last week of May 1977 (she believes the date was May 26), Conlon informed her of his intention to retire at the end of July (pp. 324, 323, 332). She asked Conlon to put it in writing, which he did in a June 2 letter delivered to her office that day. In the letter Conlon said he would retire at the end of June (pp. 324, 332). After receiving the written notice of retirement, she accompanied Conlon to the office of then Secretary of the Treasury Blumenthal and Conlon told him of his plans to retire (p. 332). Anderson said Conlon did not specify his plans following retirement (pp. 332–333).

Under Secretary Anderson also said that Conlon told her orally on June 2 that Richard Sennett would be retiring about 30 days later (pp. 347, 349). Sennett submitted his formal written notice that he would retire on June 30 to take affect July 29 (p. 348).

b. Conlon's Testimony

Conlon repeatedly asserted that his decision to retire was made "spontaneously" on June 2 and that the "catalyst" for his decision was his displeasure with the outcome of a meeting on a proposal for a new facility for BEP.[18] As noted above, Conlon said he had rejected Weitzen's November 1976 offer because he had a number of matters he wished to complete, one of which was the approval of a new facility. Conlon emphatically asserted that the communications which led to his acceptance of employment at ABN were initiated after his decision to retire.[19]

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[18] Under Secretary Anderson did not recall the discussion of the new facility proposal (p. 324).

[19] Conlon was asked about a meeting held with Weitzen in New York on June 1. (Reference was mistakenly made to June 1: the record shows that it actually occurred on May 31). Conlon said he could not recall the purpose of the meeting, but said it absolutely was not to discuss employment (pp. 474–475, exhibits 7–37, 7–38).

In his supplemental submission, Conlon said he told Anderson on June 2 that Sennett "probably would retire." This information, he said, was based upon what he heard from third parties; *viz.*, that Sennett was interested in leaving Government service (Appendix A).

Sennett denied that, prior to June 10 he had any contacts with anyone concerning possible employment with ABN (p. 384). Sennett also said that, while he never told Conlon that he was retiring, he did tell some of his associates that he was thinking of and actually looking to return to the private sector in the energy field (pp. 371, 372).

c. Analysis

If, as Under Secretary Anderson testified, Conlon advised her of his intention to retire in the last week of May, it would indicate that this decision was not based upon a spontaneous reaction to a meeting which did not go his way, but to a calculated decision. This, together with other evidence,[30] supports an inference that Conlon retired from BEP to take a job with ABN. This inference is further supported by the testimony of Under Secretary Anderson that on June 2 Conlon told her that Sennett would be retiring. This testimony tends to show that Sennett's retirement plans, as Conlon's, were linked to a prior understanding reached with ABN.

Conlon's official conduct affecting ABN during the period from November 1976 through June 1977 is discussed below.

C. Conlon's Official Conduct Affecting ABN in the Period From November 1976 Through June 1977

1. MATTERS WITHIN CONLON'S OFFICIAL RESPONSIBILITY

At the time of the November 1976 offer of employment to Conlon, and continuing through June 1977, ABN had a contractual relationship with BEP with respect to four Magna printing presses and the production and distribution of food coupons (pp. 425, 425). As a result of these relationships, ABN had become BEP's major private contractor (p. 2).

The Magna press contract was awarded in February 1974 to ABN as the low bidder at a total price of $5.1 million, with delivery scheduled between January and October 1975 (pp. 31, 321, 531). However, as a result of delays, delivery was made between November 1975 and April 1976 (p. 531).[31] BEP experienced a number of problems with the equipment which became a source of controversy between ABN and BEP in the spring of 1977, as well as after Conlon's departure from BEP in 1977 (pp. 34, 531, 320).

In the period from 1971 through June 1977, BEP awarded a series of food coupon contracts to ABN. The contracts awarded in that 1971–1977 period generated about $85 million in revenue for ABN, and profits of $[illegible] million (pp. 45–49). Only one of the contracts was awarded to ABN in the period November 1975–June 1977. This occurred on March 4, 1977, when ABN received a production contract as the low bidder after advertised solicitation of bids (p. 45).

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[30] This evidence includes Conlon's involvement in the selection and design of office space for ABN; Transtrum's testimony that Conlon said he was going to work for ABN; and Gainer's testimony that he understood Conlon had a "standing offer" from ABN.

[31] In September 197[illegible] ABN was assessed a penalty of $65,000 for late delivery on presses 1 and 2. At the end of 1977, ABN was also assessed $110,000 for work done on the presses by the Bureau (pp. [illegible]). ABN points out that it has sustained a loss of over $1.5 million on the Magna program "in order to maintain the goodwill of BEP" (p. [illegible]).

During the November 1976 to June 1977 period, BEP was actively considering the possible acquisition of ABN's anti-counterfeit system, a proposition that potentially involved the outlay of at least $14 million for equipment.

All of the foregoing matters were within Conlon's overall official responsibility as Director of BEP. However, during the period November 1976 to June 1977, it appears the only matter in which Conlon was personally and substantially involved was BEP's consideration of ABN's anti-counterfeit system, called the Signature Security System.[22]

2. INVOLVEMENT IN ABN'S SECURITY SIGNATURE SYSTEM PROPOSAL

a. Background

In June, 1976, ABN entered into an oral agreement with Coulter Systems Co. of Bedford, Mass. under which ABN would acquire exclusive rights to Coulter's anti-counterfeit technology, which became known as the SSS (p. 197). The technology consists of a treatment of authentic currency notes that can be detected by sensing devices (p. 197).

Conlon said his first material involvement in the SSS concept was on September 9, 1976, when he attended a meeting at Coulter Systems with Weitzen (pp. 61, 466).

Conlon brought the SSS concept to the attention of Thomas Gainor, who chaired the Federal Reserve's Subcommittee on Currency and Coin. The Currency and Coin Subcommittee had an ongoing project, in which Conlon and BEP were participating, to study an anti-counterfeit system offered by General Telephone and Electronics[23] for possible use in high speed currency handling machines in Federal Reserve banks (p. 273). In the following months, the Subcommittee on Currency and Coin gave serious consideration to the SSS proposal and, based primarily upon Conlon's recommendation, ultimately decided to initiate steps toward acquisition of SSS.

ABN stood to benefit significantly if the U.S. Government adopted the SSS. It involved potential sales of two currency paper treatment machines to BEP for about $7 million per machine (exhibit 7–51, p. 162) and many sensors to be used by Federal Reserve banks in high speed currency machines. ABN might derive additional revenue from technical services, maintenance and engineering support (exhibits 7-41, 7–71).[24] ABN further contemplated marketing sensors to private retail business that deal in high volumes of cash (p. 521). Also, U.S. Government purchase of the SSS might provide ABN a "selling point" in efforts to place this system with foreign governments.[25]

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[22] An expense voucher of Charles Sharkey, which was subpenaed from ABN indicates that on February 15 and 25, 1977, Sharkey met with Conlon at the Marriott Hotel in Crystal City. The entry for February 15 lists the purpose as "Discuss food coupons and other areas." The entry for February 25, 1977 lists the purpose as "food stamps" (p. 65). The investigation did not ascertain the nature of the discussions, so it is unknown whether it had any bearing on the food coupon contract on which bids had been solicited on February 17, and which award was made to ABN on March 4.

[23] Conlon testified that one of the reasons he turned down Weitzen's offer of employment with ABN was to implement his objective of producing the first tagged currency for September 1977 (see p. 6 of this report). His objective at that time was based upon a process being developed by GTEL which he later revised to early 1978, based upon SSS (Appendix A).

[24] ABN's cost proposal quoted a price of over $2 million for engineering support, development of prototype sensors, and development of manufacturing materials and quality control instructions. ABN also offered to submit a quotation for service and maintenance and training (exhibit 7–71).

The role played by Conlon in the advancement of ABN's SSS proposal is discussed in two parts, which are divided chronologically: First, November 1976 to June 10, 1977, which is also the period of ABN's November 1976 offer of employment and Conlon's November 1976–February 1977 involvement in the location and design of office space for ABN. Second, June 10, 1977 to his retirement on July 1, 1977, which is also the period in which Conlon acknowledged negotiating and accepting employment from ABN.

b. November 1976 to June 10, 1977

During the week of November 19, 1976, Conlon told Gainor that ABN had acquired anti-counterfeit technology and invited Gainor to Washington to meet with him and Weitzen (pp. 272, 467). According to Weitzen's expense account records, he had lunch with Conlon and Gainor in Washington on November 18.[26]

On December 7, 1976, Conlon, Weitzen, and Gainor met at Conlon's office at BEP to discuss the SSS (pp. 62, 272, 273, 467).

On December 13, 1976, Gainor and Conlon met in Minneapolis for the purpose of briefing John Stoides concerning the new SSS concept.[27] Stoides is the Project Manager of the High Speed Currency Processing Project for the Subcommittee on Currency and Coin (pp. 63, 275–276).

Gainor said that, at the meeting, he, Stoides, and Conlon identified questions that should be answered by ABN or the participating government agencies in the connection with the assessment of the technology (pp. 63, 276). He said the questions dealt primarily with scheduling, time, and further testing, which he felt were satisfactorily addressed (p. 282). However, he said that there were some additional questions he raised at a later meeting with Conlon and Weitzen which related to the "ultimate use" of the SSS as to which he did not get concrete evidence that they were resolved (p. 282). Gainor said he felt no obligation to satisfy himself on those unresolved questions because they did not relate to the Federal Reserve's role (p. 282). In this connection, during his tenure as Chairman of the Federal Reserve Subcommittee, he considered the decision to acquire and procure the SSS equipment used to treat the currency to be within the exclusive province of BEP, and not a Federal Reserve Board decision (pp. 194, 285, exhibit 7–70). The Federal Reserve's interest was to assure that the SSS, especially the sensors, would be compatible with automatic currency processing equipment (pp. 194, 281, 282, 287, exhibit 7–70). Gainor pointed out that BEP alone had the technical expertise and capability to make the final decision as to whether SSS should be adopted and that he and the Fed Subcommittee were relying upon BEP and Conlon to make this evaluation (pp. 194, 272, 276, 281, exhibit 7-70). Conlon acknowledged that his judgment and recommendation would be controlling (p. 435).

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[25] In an interview, Edward Weitzen of ABN told the staff that it was important to see whether the U.S. Government would acquire this equipment first and then he intended to make it available to other countries as well (p. 231).

[26] It appears that Weitzen's offer of ABN's presidency occurred on or about this date in November. (see p. 6 of report).

[27] On the previous day, Conlon had disclosed to Gainor that he had received a job offer from ABN (see p. 10 of report).

Conlon wrote a letter dated December 22, 1976 to Weitzen requesting a meeting with ABN to obtain additional information and details in 34 enumerated areas. The letter pointed out that critical to the support of a recommendation to terminate the GTEL project and adopting the SSS would be a persuasive demonstration of the reliability and advantages of the SSS (pp. 75-76, exhibit 7-15). To assist in the project, BEP provided ABN some distinctive currency paper on which currency is printed (exhibits 7-15, 75-76, p. 64).[28]

In a letter dated January 14, 1977, Weitzen replied to Conlon's letter of December 22, 1976 proposing a meeting in Boston on January 17, 1977 to discuss the SSS technology, and a meeting during the week of February 7, 1977 at BEP for a demonstration (p. 92, exhibit 7-19). The meetings were held on January 17 and February 9, both of which Conlon attended (pp. 276, 471-472).

At the February 9 meeting, attended by Conlon, Gainor, and others, ABN gave a static test demonstration.[29]

On April 21, 1977, ABN gave a demonstration at BEP, which was attended by Conlon, Gainor and others. Gainor said it consisted of taping a currency note to a drum which was spun at the speed of a processing machine, with lights indicating whether the signal placed in the paper was detected (p. 277). Gainor described the tests as a "simple demonstration, breadbox type, with rather crude equipment," that was designed to answer the question "whether the SSS signal is detectable, first statically, then dynamically" (p. 277). He said "that was all we really expected at that stage of development" (p. 277). Both tests demonstrated that the signal was detectable.

After the dynamic test on April 21, Conlon, Gainor and Stoides met privately in Conlon's office. They decided to move in the direction of SSS given its advantages over the GTEL system (pp. 283, 473).

On May 10, 1977, Conlon wrote to Gainor to formalize the conclusions reached by the Bureau relative to the signature system to be utilized in the manufacture of United States currency (p. 115, exhibit 7-31).

Conlon wrote in his letter that ABN's SSS is "significantly superior in the best interests of the Government" on the basis of several considerations, including features that would permit complete internal control and "the uniqueness of the new system technology raised by several levels the difficulties of illegitimate analysis and efforts at simulation." Conlon further stated that he would advise ABN of "our [BEP's] interest in acquiring equipment for the Bureau's manufacture of currency employing the new technology" and that, "as early as we are able to complete arrangements for this acquisition" he would prepare for discussion with Gainor and Stoides "a timetable towards the availability of the first currency adapted for use on the automated currency handling equipment."

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[28] In the course of a food coupon accountability audit in February 1979, a representative of BEP's Security office discovered that ABN had distinctive paper for which neither ABN nor BEP had the strict accountability records as required by BEP security regulations (p. 64).

[29] One observer at the meeting, Kenneth DeHart, former Deputy Director of BEP, said the demonstration consisted of a "black box" sensor with two lights, one of which went on if treated currency was placed on it, the other light went on if untreated currency was placed on it (p. 64; Appendix A).

On May 17, Conlon wrote to Weitzen to tell him that he had advised Gainor that "the Bureau has determined that the adoption of the Security Signature System * * * will be in the best interests of the Government" (pp. 118–119, exhibit 7–32). The letter requests that ABN furnish BEP's Office of Administrative Services "cost information for the Bureau's acquisition of signature application equipment" and pricing information for sensors designed for commercial manufacture. The letter also requested ABN's "continued efforts to expedite this information" and "concurrent agreements for equipment availability."

On June 6, 1977, Gainor replied to Conlon's May 10 letter, advising that:

> * * * On the basis of the several discussions and demonstrations in which John Stoides and I participated as representatives of the Federal Reserve's currency equipment development program, our conclusions are: (1) that the proposed system is compatible with the currency processing equipment we are developing, and (2) that its advantages with respect to security, cost, and flexibility offer a unique opportunity to improve U.S. currency in a way consistent with the needs of the Federal Reserve Banks as well as the Treasury.
>
> We fully support the direction outlined in your letter and look forward to working with you and your staff in the development of a timetable outlining the steps needed to bring this promising new concept to full fruition (p. 137, exhibit 7–40).

Prior to receipt of the Gainor letter, Conlon submitted a memorandum to the Secretary of the Treasury requesting a meeting to brief the Secretary on changes to U.S. currency involving design adjustments and a confidential new treatment to assure authentication in automated currency handling (p. 120, exhibit 7–33).

After Under Secretary Anderson wrote a May 23 memorandum directing Conlon to route matters directly to the Secretary through her office (Exhibit 7–34, 123), Conlon transmitted an information memorandum to the Secretary through Under Secretary Anderson (Exhibit 17–38, p. 133; Exhibit 7–36, p. 127). The memorandum states that:

> BEP is currently acquiring the equipment necessary for appropriate preparation of the currency. It is estimated the first new currency will be manufactured in the first part of 1978 (p. 133, exhibit 7–38).

On June 2, Conlon met with Secretary of the Treasury Blumenthal after he submitted his written notice of retirement to Under Secretary Anderson. At the meeting he orally advised the Secretary of his retirement and also gave a demonstration of the SSS (pp. 68, 142, 323; exhibit 7–42; Appendix A).

c. June 10, 1977 to Retirement on July 1, 1977

As discussed above, Conlon denied that he was negotiating or had any arrangement with respect to prospective employment with ABN prior to June 10. If he had engaged in such negotiations, it would necessarily raise a conflict of interest question in view of his significant involvement in the SSS project. However, Conlon did admit that on

June 10 he met with Weitzen and decided to go to work for ABN. Only the details of a written contract remained to be completed. In the meantime—until his retirement on July 1, Conlon continued to act in his official capacity as Director of BEP in the SSS matter.

On June 20, Conlon sent a sample currency note which had received SSS treatment to Dr. Edward Graminski of the U.S. National Bureau of Standards (NBS). Conlon's handwritten transmittal note of that date states:

> Per our discussion, for your forensic analysis. Interested in your identification of our treatment, level of difficulty of detection, and potential for simulation (p. 141, exhibit 7–41A).[30]

Conlon did not satisfactorily explain why he sought this evaluation after he decided to acquire the SSS, indicated only that he was "very curious" and "interested" in the NBS's findings (p. 472).

Conlon testified that he asked Dr. Graminski to report back before the end of June because he (Conlon) was retiring, but NBS was unable to meet that deadline (p. 471). Conlon said it took 4 months before NBS identified the low level ingredient involved and cited this as evidence of the effectiveness of the system (p. 471).[31]

Conlon admitted that this was the first time he sought an independent evaluation of the SSS from persons outside of BEP (pp. 402, 471). He cited the need to handle the project on a "very strict need to know basis" (p. 471). Gainor also testified that he never received a BEP report giving the rationale and analysis of its evaluation of SSS (p. 282). There was no evidence in the Subcommittee's inquiry to show that such a report was written or independent analysis made of the SSS technology prior to Conlon's retirement (p. 219). In this regard, the Treasury Department told the Subcommittee that it was unable to locate any records indicating that BEP made any studies to justify the expenses of the SSS in terms of the nature and scope of the problem of counterfeiting (p. 323).

Edward Weitzen wrote a letter, dated June 20, 1977 to Jules Reider, BEP's Chief of the Office of Administrative Services, transmitting an SSS cost proposal in response to Conlon's letter of May 17 to Weitzen (p. 138, exhibit 7–41). The proposal quoted a price of $19.6 million for two machines to treat the currency paper. The price was based on a lease-to-purchase base, which included interest (pp. 138–139, 162; exhibits 7–41, 7–51).

The proposal was submitted at a meeting on June 21, 1977, which was attended by Conlon, Reider, Assistant Director Seymour Berry,[32] and Assistant Director Everett Prescott (p. 68). Conlon said he absented himself from the meeting after introductory formalities (p. 461; Appendix A).

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[30] It appears that Conlon may have sought NBS's technical advice because of the limitations on BEP's research capability. In this connection, Conlon pointed out BEP had a continuing contract with NBS dedicated to ongoing paper and metallurgy apparently because of BEP's "limited research facilities and personnel" (p. 403). He pointed out that a January 1977 Arthur D. Little Co. report to BEP on the need to expand its anti-counterfeit research capability (pp. 485–486).

[31] The NBS test did identify the material with which the sample currency note was treated. NBS did not evaluate the difficulty of detection and simulation by outsiders (p. 220, exhibit 7–69).

[32] A few days prior to that meeting, Conlon had recommended to Under Secretary Anderson and Secretary Blumenthal that Berry be appointed to succeed him as Director of BEP (pp. 135, 142; exhibits 7–39, 7–42).

By letter of June 22, S. F. D'Amato, President of ABN, wrote to Reider, quoting a cash price of $13.9 million, in lieu of the lease-to-purchase price (Exhibit 7–51, p. 162). D'Amato wrote that he was responding to Reider's request at the June 20, 1977 "Proposal opening on June 21."

On June 24, 1977, Conlon wrote a letter to Governor Phillip E. Coldwell of the Federal Reserve Board (p. 169; exhibit 7–54). Conlon wrote that he was following up on their "recent conversation" in which Conlon had asked for Governor Coldwell's consideration of cost-saving advantages which could accrue to the Federal Reserve if it advanced the funds to BEP for a direct purchase of the SSS equipment because BEP lacked the funds to do so. The letter indicates that BEP asked ABN to quote the price of the machines on a lease-to-purchase basis. The letter continued:

> In follow-up of your discussion, I have requested the supplier to identify a cost for each machine on a direct purchase basis, which has been quoted at $6,971,530 per machine. Accordingly, if the Federal Reserve can advance costs of our acquisition of the machines, the real savings to the Federal Reserve will approximate $14,372,940 in the five-year period.[33]

Conlon concluded the letter by stating:

> The instant equipment is critical to the full implementation of the automated currency processing equipment in the Federal Reserve Banks. It has been evaluated by the Subcommittee on Currency and Coin, and by the Bureau, to be uniquely suitable to the requirements of the currency processing equipment in technology, security, cost and flexibility (copies of evaluations attached). The timetable for delivery after acceptance of the proposal is nine months. Concurrent development of ancillary processes would be initiated to assist early production thereafter of fully adapted currency of the new design for continuing delivery to the Federal Reserve Banks.
>
> We are hopeful the Federal Reserve will be able to approve a prepayment advancement of funds to permit our early direct purchase of this essential equipment, as the most cost-effective method of acquisition. We will appreciate advice of your decision, and will, of course, proceed in accordance with your determination.

The evaluations attached to Conlon's letter consisted of copies of Conlon's May 17 letter to Gainor and Gainor's June 6 letter to Conlon (p. 569).

It is particularly significant that Conlon's June 24 letter endorsed the SSS proposal as "uniquely suitable" in terms of cost. The first indication of the receipt of a cost proposal by ABN was on June 21 and a follow-up by an alternative ABN cost proposal dated June 22. It is doubtful BEP could have made a thorough analysis of the proposals before Conlon wrote his June 24 letter. As noted above, the Treasury Department reported that it was unable to locate any records indicating that BEP had made any studies to justify the expense of the SSS.

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[33] The letter asserts that an advance of the funds by the Federal Reserve would permit the Federal Reserve to avoid $14.3 million in higher costs associated with the lease-to-purchase arrangement and BEP overhead charges that would otherwise be passed on in regular billing rates.

Nevertheless, Conlon endorsed the price exactly as quoted by ABN in its June 22 direct cash purchase proposal in asking the Federal Reserve to advance that amount to BEP to cover the cost of acquisition.

Conlon's letter also reaffirmed without qualification an endorsement of the SSS from a technical point of view despite the fact that on June 20 he himself had sought an independent technical evaluation relating to the security of the system from the National Bureau of Standards, which did not report its findings until 4 months later. In contrast, Conlon's May 10 letter to Gainor, which was attached to his June 24 letter to Governor Coldwell, said the "uniqueness of the new system technology raises by several levels the difficulties of illegitimate analysis and efforts at simulation." Whatever analysis Conlon may have made as to this technical issue to support this conclusion does not appear to have been reduced to any written form (pp. 63–65, 282, 323, 367).

d. Status of SSS Project in June 1977

As noted above, Conlon's May 31 memorandum to Secretary Blumenthal states that BEP is "currently acquiring" the equipment necessary for the preparation of the currency for the new anti-counterfeit detection system and estimated that the first new currency will be manufactured in the first part of 1978 (p. 133, exhibit 7–38). Conlon's June 24 letter to Governor Coldwell said the timetable for delivery is 9 months after acceptance of the ABN proposal and requested that advance of Federal Reserve funds to permit the "early" purchase of the equipment (pp. 170–171, exhibit 7–54). Conlon also testified that prior to his June 10 job discussion with Weitzen, he had "completed" the decision to acquire the SSS pursuant to his authority as Director of BEP (p. 445).[34]

Gainor had a different opinion as to how far the SSS project had progressed. Gainor said that his perception of the decision made by Conlon, Stoides, and himself after the April 21, 1977 dynamic demonstration of SSS, and formalized in their exchange of letters, was that SSS was a promising new direction that ought to be pursued (pp. 283–285). He said he did not anticipate (as Conlon stated in his memo to Blumenthal) that the new SSS equipment would be producing currency as soon as the first part of 1978, because of the additional steps that were necessary as the project developed from the proposal stage to a final decision to purchase (pp. 283, 284). Gainor said:

> * * * I think all of us were under the impression that there was going to be a lot more evaluation taking place be-

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[34] In making his decision, Conlon did not receive any input or explicit approval from senior Treasury Department officials. In this connection, Under Secretary Anderson said that prior to July 1977, there was no requirement that BEP submit a procurement of this magnitude to the Department of Treasury for approval (pp. 314, 315, 357). She maintained that main Treasury had not authorized Conlon to commit BEP to acquisition of SSS, and that such a decision should be made at the main Treasury (p. 351). However, as the Under Secretary pointed out, at the time of Conlon's decision to commit BEP to this acquisition, she understood the SSS project to be a Federal Reserve matter and the relationship between BEP and Treasury was in a state of transition (and some confusion) from one in which BEP operated independently in this type of decision-making to one of closer supervision by main Treasury (pp. 350–351, 358).

> fore the final judgment as to its acceptability. We felt as the program progressed from the proposal stage through an evaluation stage, we would get a lot of additional information (p. 283).

Gainor added that the decision on April 21 was an important one involving a move in a different direction from that in which they had been moving, but "it wasn't an irrevocable decision to buy it whether it worked or not. It was a question of defining our acquisition and our next steps in such a way that we could further evaluate and control" (p. 283). He noted that, up to this point, the relationship with ABN had been "verbal" and they had now reached the point of "getting the commitment from them (ABN) as to the qualities of the equipment, the details of the equipment * * * so we can then begin to evaluate" (p. 283). Gainor said he believes his June 6 letter to Conlon reflects his perceptions by stating that the Subcommittee on Coin and Currency "fully support the direction outlined in your letter [of May 10] and look forward to working with you and your staff in the development of a timetable outlining the steps needed to bring this promising new concept to full fruition" (pp. 137, 284; exhibit 7-40).

The record indicates that Conlon did not consult with Gainor or anyone else associated with the Subcommittee on Currency and Coin of the Federal Reserve prior to sending the June 24 letter to Coldwell (pp. 194, 284). The rapidity with which Conlon acted between the time of the receipt of the ABN cost proposal to the writing of his June 24 letter to Governor Coldwell creates an appearance of a man in a hurry to implement a decision that will benefit his prospective employer. This appearance is intensified by the fact that Conlon sent the letter prior to receiving the forensic analysis he had requested 4 days before from the National Bureau of Standards.

Following Conlon's retirement the Department of Treasury sought and obtained clearance from the respective Appropriations Committees of the Senate and House of Representatives for the use of Federal Reserve Funds to purchase the SSS equipment (exhibits 7-66, 7-67, 7-68). However, the SSS proposal became stalled after confusion arose about the relative roles of BEP and the Federal Reserve in the procurement decision (pp. 314, 361, 533, 534).

In 1978, after clarification of these roles, a joint BEP/Federal Reserve contract negotiating team was formed to evaluate a new ABN cost proposal for SSS. After extensive investigation, it was the consensus of the negotiating team that the procurement of SSS should be deferred for two primary reasons:

> 1. The SSS does not satisfy all of the Government's criteria for anticounterfeiting technique.
> 2. With the quantity of proprietary technology employed in the SSS and only one other viable * * * system (GTEL), it is impossible to reconstruct the component value of the machinery or to obtain a valid cost comparison with comparable techniques (p. 534).

Governor Coldwell of the Federal Reserve reported to the Subcommittee that—

> In view of the concerns raised by the negotiating team, an effort to evaluate other available technologies was instituted in January 1979. That effort is continuing (p. 534).

Under Secretary Anderson said SSS is one of numerous anti-counterfeit technologies now under consideration by the Department (pp. 314, 324).

D. QUESTIONS CONCERNING PROPRIETY OF CONLON'S CONDUCT

1. INTRODUCTION

During its hearings, the Subcommittee carefully examined Conlon concerning his preceptions of the ethical implications of his conduct. These matters were also explored with Gainor and Weitzen. As the following discussion shows, Conlon displayed an unsettling insensitivity to these implications.

2. CONLON'S TESTIMONY

a. November 1976 Offer of Employment to Conlon

Conlon was asked whether he notified anyone in the Department of Treasury that he had received the offer of the presidency of ABN which Weitzen made to him in November 1976. Conlon replied that he did not do so and was not aware of any such requirement. Treasury Department officials confirmed that there was no provision in its conduct regulations specifically requiring the reporting of such an offer or any employment negotiations or arrangements (see p. 41 of this report). However, these regulations do provide that an employee must avoid "any action, whether or not specifically prohibited * * * which might result in, or create the appearance of * * * using public office for private gain, giving preferential treatment to any person, * * * losing complete independence or impartiality; or affecting adversely the confidence of the public in the integrity of the government" (31 C.F.R. 0.735-30).

Conlon also said he did not see any problem with the offer and never considered disqualifying himself from any further negotiations or contracts with ABN (p. 427). He considered it a "straightforward honest offer, predicated on the facts of the President's vacancy and understanding of my eligibility and interest in retirement." Conlon saw nothing unusual about the offer and had no concern even about any appearance of impropriety in the circumstances surrounding the offer, despite the fact that he was personally considering the ABN's SSS proposal at the time (pp. 431-433). Conlon does assert that there was no "appearance" problem, because the conversation concerning the offer was between only himself and Weitzen, and hence, there was "no visibility to it," i.e., nobody knew about it besides Conlon and Weitzen (pp. 431-433, 440). Conlon summed up by stating that he "certainly had no qualms, consciously, quite the contrary, I felt very complimented by the offer" (p. 433).

b. Location and Design of Office Space for ABN

As noted above, Conlon testified that his location and design of office space, which he now occupies as President of ABN Development Corporation, constituted an act of courtesy or favor to ABN. Conlon indicated that he did not question the propriety of performing the service, despite the significant business relationship ABN had with

BEP (p. 431). He was unable to recall one occasion in which he did perform similar favors for any other private firm (p. 431).[38]

c. June 1977 Job Negotiations and Contract

As to the June 10 offer, negotiations, and contract for employment with ABN, Conlon said he saw "nothing untoward whatsoever, about * * * retiring and taking private employment," and saw no need to disclose to his supervisors the offer, negotiations, and contract, because there was no requirement to do so (pp. 426, 427, 434, 446, 447). He also said that after June 10 he "absented" himself from consideration of the ABN cost proposal submitted on June 21 and that he did not otherwise take any official action affecting ABN's financial interest (pp. 437, 444).

When asked whether he thought it was proper to write the June 24 letter to the Federal Reserve. Conlon replied that he saw no conflict of interest implication then or at the present time. He asserted that the letter did not "involve ABN in any way, shape, or form," explaining that it would not affect whether ABN would get the contract, the price of the contract, or the profit ABN would realize as a consequence of that purchase (pp. 436–437). He further asserted that the decision to acquire the SSS was "already complete"—made by him pursuant to his authority as the Director of BEP before June 10—the date on which he orally agreed to go to work for ABN (p. 445). The June 24 letter, Conlon also argued, dealt only with internal government matters; i.e., the method of financing the BEP's acquisition of SSS equipment that in his view would be less costly than BEP's purchasing on a lease-to-purchase basis (pp. 436–438).

3. GAINOR'S TESTIMONY

Gainor was asked whether he had any concern as a result of Conlon's disclosure in December 1976 that he had received a job offer from ABN (p. 277). Gainor replied in the negative, explaining that he felt he knew Conlon well enough, and had enough respect for his integrity, that he would not allow any kind of pending offer to affect his judgment (p. 277). However, Gainor said he did tell Conlon something to the effect that, if he went to work for ABN, it would be "awkward" if Conlon represented ABN on the SSS matter (pp. 274, 278). Gainor said Conlon told him that, if he went to work with ABN, it would be in something completely different from the SSS (p. 274).

In response to Senator Cohen's question whether Conlon found anything questionable about a private company making a lucrative job offer to a Government official with whom it is doing business on a pending matter, Gainor replied:

> I don't think it is an ideal situation by any means (p. 278).

Senator Nunn pursued this point with a series of questions about a hypothetical situation:

> Senator NUNN. Let's assume Mr. Brooks, who is your purchasing agent, is about to negotiate a contract with Brinks. Brinks has made a certain submission, offer. Let's assume that Mr. Brooks has been offered $100,000 a year to come to work for Brinks when he retires, during the course of this negotia-

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[38] His secretary of ten years, Mary Catherine Kirk, was also unable to cite such an instance (p. 580).

> tion. Do you think Mr. Brooks should notify you of that offer?
>
> Mr. Gainor. Yes.
>
> Senator Nunn. You would expect him to?
>
> Mr. Gainor. Yes.
>
> Senator Nunn. Why?
>
> Mr. Gainor. Because of his potential for judgment.
>
> Senator Nunn. You trust Mr. Brooks, do you not?
>
> Mr. Gainor. Yes.
>
> Senator Nunn. You think he is a man of integrity?
>
> Mr. Gainor. I do.
>
> Senator Nunn. Do you think he is equal to Mr. Conlon in your estimation of integrity?
>
> Mr. Gainor. I would think, yes.
>
> Senator Nunn. As his employer, you expect Mr. Brooks to come to you and let you know he has been offered $100,000 a year by Brinks? Is that right?
>
> Mr. Gainor. Yes, sir.
>
> Senator Nunn. What would be your reaction if he had notified you of that last week? Would you continue him on his negotiating job with Brinks?
>
> Mr. Gainor. Probably not.
>
> Senator Nunn. Why not?
>
> Mr. Gainor. Because of the appearance of conflict (pp. 278–279).

Gainor said that if he had known Conlon was going to work for ABN at the time he (Gainor) wrote his June 6 letter giving the Currency and Coin Subcommittee's concurrence to proceed with the SSS project, it would have caused him some concern about the possible appearance of conflict of interest and that he probably would have put some "caveats" in his letter (p. 285). Gainor subsequently expressed such a concern to Peter Viguerie, his successor to the Chairmanship of the Subcommittee on Currency and Coin. Sometime around December 1977, Gainor learned that Federal Reserve proposed to purchase the SSS, a proposal that, unbeknowst to him, had been initiated by Conlon's June 24 letter to Governor Coldwell. On December 7, 1977, Gainor wrote to Viguerie about a number of questions he had concerning the merits of the SSS proposal (p. 196, exhibit 7–70). He pointed out that these questions were never answered to his satisfaction, and that he did not pursue them "on the basis that they were clearly within the province of the BEP in its role as purchaser of the equipment."

These questions included whether (1) the SSS technology was a product of U.S. Government research; (2) BEP has given assurances as to the system's effective performance and security; (3) the U.S. Government would be the sole user of SSS, and whether availability of the system to other governments would diminish security; and (4) ABN would retain exclusive rights to market sensors.

Gainor's letter pointed out that:

> None of the questions cited above are new to the vendor [ABN], or to James Conlon, former director of the Bureau. Possibly some or all of them may be addressed in the proposal; however, in view of Mr. Conlon's change to the other

> side of the table and the subsequent proposal by the BEP directly to the Board, I'd like to be sure that the information and questions that we raised are available to those making the final decision for the Fed * * * (p. 196).

4. WEITZEN'S TESTIMONY

Weitzen denied that his November 1976 or June 1977 offer of employment to Conlon or his request that Conlon look into the availability of office space for a new ABN-Washington, D.C. area office was part of a calculated strategy to advance the position of his company (p. 511). He stated that the November job offer to Conlon was prompted by a forthcoming vacancy in the presidency of ABN and his desire to fill it with a person of Conlon's well-recognized technical expertise and entree to potential purchasers of ABN's new technical products (p. 508).

He also indicated that he was concerned that Conlon might go to work for a competitor of ABN. Weitzen did not consider it unusual in November 1976 to ask Conlon to look into the available office space (p. 505). But, he added that, until he heard testimony in the hearings, he never knew the details or time Conlon spent on the office space and was "horribly embarrassed" by it. He said, with hindsight, that it was not the correct thing to ask Conlon to perform that task (pp. 517, 519).

Weitzen's offer of employment to Conlon in June was prompted by Conlon's announced retirement (p. 507). He said he wanted to employ Conlon in June 1977 for the same reasons he wanted him in November 1976; i.e., Conlon's expertise and Weitzen's concern that Conlon may go to work for ABN's competitor (pp. 503, 508–511, 513). He had no "qualms" about hiring Conlon in June 1977, since he felt he was not under any moral or other obligation to Conlon (p. 515). However, Weitzen said he did ask Conlon if he (Conlon) needed permission from anyone to work for ABN and whether it was in any way against the rules, but that Conlon replied in the negative (p. 516).

Weitzen acknowledged that, with the benefit of hindsight, he could understand and respect the necessity of the Subcommittee's inquiry because of the appearances created by the chain of events (pp. 505–506, 511, 519). In response to Senator Percy's question as to what he might have done differently, looking back, to avoid the appearance of conflict of interest, Weitzen said,

> * * * if I knew in June 1977 what I know today in terms of the fact that it seems that appearances form the basis of judgments, not always the facts, and are a very difficult front, I doubt seriously whether I would have hired Mr. Conlon in the first place, Senator (p. 515).

5. ANALYSIS

Weitzen and Gainer demonstrated some appreciation of the nature of appearances of conflict of interest and impropriety, although their appreciation was largely the product of hindsight. Conlon, on the other hand, adamantly refused to admit that his conduct created any such appearance. The Subcommittee's appraisal of Conlon's conduct and of existing rules governing Government employees is contained in its Findings, Conclusions and Recommendations (Part VIII).

III. POST HEARING DEVELOPMENTS CONCERNING JAMES CONLON: CRIMINAL PROCEEDING FOR ALLEGED VIOLATION OF 8 U.S.C. § 208

Following the Subcommittee hearings, on August 9, 1979, the Grand Jury for U.S. District Court for the District of Columbia returned an indictment charging Conlon with a violation of 18 U.S.C. § 208.[1] Count One of the indictment alleged in pertinent part that

> In the period from in or about December 1976 through June 1977 * * * James A. Conlon * * *, being an officer and employee of the executive branch of the United States Government * * * unlawfully and knowingly did participate personally and substantially as an officer and employee, through decision, recommendation, and the rendering of advice, in a proposal of the American Bank Note Company for a Security Signature System for U.S. Currency, a particular matter in which to his knowledge the American Bank Note Company, a company, with which he was negotiating and had an arrangement concerning prospective employment, had a financial interest.[2]

The indictment also charged Conlon with three counts of making false statements in his testimony before the Grand Jury in violation of 18 U.S.C. 1623(a). Alleged as false were Conlon's statements that: his decision to retire was made spontaneously on June 2, 1977 (Count Two); he did not initiate and prepare his June 24, 1977 letter to Governor Coldwell of the Federal Reserve Board (Count Three); and he played no role with respect to the formal SSS cost proposal submitted by ABN and withdrew himself from consideration of the proposal (Count Four).

On October 15, 1979, Judge Louis F. Oberdorfer issued an Order granting Conlon's motion to dismiss the conflict of interest charge (Count One) (Appendix G). In his Order and a Memorandum filed October 26, 1979 (Appendix H), Judge Oberdorfer held that, in order to save 18 U.S.C. § 208(a) from unconstitutional vagueness, it was necessary to construe the word "negotiating" to require allegations in the indictment of specific acts of negotiating by Conlon in concert with a prospective employer, and to construe the word "arrangement" to require allegations of specific bilateral arrangements or acts of arranging.[3] He found that the indictment failed to set forth these elements of the offense with sufficient particularity. However, the dismissal of the Count was without prejudice to subsequent reindictment in a form properly charging an offense under 18 U.S.C. § 208(a) as construed in the opinion.

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[1] This provision makes it unlawful for a Government employee to participate personally and substantially in any matter in which an organization with whom he is negotiating or has any arrangement with respect to prospective employment, has a financial interest (18 U.S.C. § 208(a)). An exception is provided under Section 208(b) if the employee obtains a written determination that the financial interest is not substantial enough to have an effect on the integrity of his services. Violators are subject to a fine of up to $10,000, or imprisonment of up to 2 years, or both. The text of 18 U.S.C. § 208 is set forth in Appendix E.

[2] *United States* v. *Conlon*, Criminal Number 79-390 (D.D.C. 1979). A copy of the indictment is in Appendix F.

This appears to be the first case under 18 U.S.C. § 208 that interprets the terms "negotiation" and "arrangement." Judge Oberdorfer noted the absence of any authoritative definition of the terms "negotiating" or "arrangement" in the legislative history or otherwise (Memorandum, pp. 6, 12). He rejected the definitions offered by the Government in its proposed jury instructions, which were drawn from Webster's New World Dictionary and a civil government contracts court decision (Memorandum, pp. 4, 7–8). The proposed instructions would have directed the jury that:

> The term "arrangement concerning prospective employment" means a plan or agreement with respect to future employment.
>
> The term "negotiating" means submitting and considering offers until an acceptable offer is made, and accepted, or until it becomes apparent that no acceptable offer will be made. The brevity or the length of this process does not remove it from "negotiating."

Judge Oberdorfer ruled that Section 208 was not intended to extend criminal sanctions to "the most insubstantial contacts" between a Federal official and a potential outside employer. Therefore, an indictment brought under Section 208 must contain "specific allegations about bilateral negotiating and arranging" future employment. He dismissed the indictment because it failed to allege such specific conduct (Memorandum, p. 16).

On September 28, 1979, Judge Oberdorfer issued an Order granting Conlon's motion to dismiss the three false statement counts in the indictment on the grounds that they were too vague and imprecise and otherwise inadequately alleged the crime of false declaration under 18 U.S.C. 1623(a) (Appendix G). The Government also appealed the dismissal of these charges.

On April 16, 1980, the U.S. Court of Appeals for the District of Columbia Circuit affirmed the District Court's dismissal of three false declaration counts against Conlon but reversed the District Court's dismissal of the conflict of interest count. The Court of Appeals held as follows:

> We find that it is not necessary to require the pleading of "Specific acts of negotiating" or "specific bilateral arrangements or acts of arranging" in order to save § 208(a) from vagueness. In the context before us, the terms "negotiating" and "arrangement" are not exotic or abstruse words, requiring detailed etymological study or judicial analysis. They are common words of universal usage. People of ordinary intelli-

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[3] In 1962, Congress added to 18 U.S.C. § 208 (previously 18 U.S.C. § 424), the language "any person or organization with whom he is negotiating or has any arrangement concerning prospective employment" to the list of outside connections prohibited to a Federal employee transacting official business with that person or organization (Public Law 87–849).

> gence would have fair notice of the conduct proscribed by the statute. That there may be marginal cases is not sufficient reason to hold that a statute is too ambiguous to define a criminal offense. [Footnote omitted.]
>
> Thus, the narrowing construction imposed by the district court was not constitutionally required. Moreover, a narrow construction does not comport with the legislative history. The words of the statute must be read so as to effectuate the legislative purpose. This will often mean giving the words a broad, rather than a narrow reading. * * *

The Court also held that the indictment adequately plead a violation of section 208(a).

Following the reinstatement of the indictment, Conlon was tried before a jury and was found guilty on July 28, 1980, of the conflict of interest charge. On September 12, 1980, he was sentenced to one year's unsupervised probation and fined $7,500.

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IV. APPEARANCE OF CONFLICT OF INTEREST AND IMPROPER CONDUCT—THE CASE OF RICHARD SENNETT

A. Employment Discussions

Sennett testified that he was first contacted about his interest in employment with ABN by Conlon on or about June 10, 1977 (pp. 61, 92, 372). He said the matter of salary was not discussed at that time (p. 322). As previously noted, Sennett told Conlon he would be interested in considering such employment and Conlon so advised Weitzen (p. 328). About a week later Weitzen personally visited Sennett at BEP (p. 372).

Sennett said the meeting with Weitzen took place sometime in the period from about June 15 to 17, but could not recall the specific date (p. 372). However, he said it definitely occurred before June 20 (pp. 373, 377). Sennett told Weitzen he would be receptive to a formal offer which addressed his primary concerns which were pension benefits and insurability because of a cancer condition he had in 1974 (pp. 372–373). Sennett said that after the meeting with Weitzen he was not sure whether or not Weitzen would actually follow up with a firm offer (p. 373).

Sennett testified that on June 24 he received a written offer of employment from ABN which was dated June 22. He said he did not sign the offer, but made a written counter-offer on June 27 which asked for salary of $50,000 (instead of $48,000) and specified his title as Vice-President.[1] ABN accepted and signed his counter-offer on June 27 (pp. 370–371, 373–374, 377–378). Sennett signed the contract on June 28 (pp. 172, 274, exhibit 7–55). Sennett said no other conversation or meeting took place with ABN with respect to the employment contract other than the one with Weitzen (p. 377).

On June 30, Sennett gave written notice of his intent to resign on July 29 (pp. 348, 378). Sennett began work at ABN on August 1 (p. 122, exhibit 7–55).

B. Official Conduct Affecting ABN

Sennett admitted that on June 22 and 23 he met with ABN's President, Salvatore F. D'Amato, concerning difficulties with Magna presses (p. 278). These meetings were a follow-up to a recommendation Sennett had received from BEP's Chief of Engineering stating that there was a need to resolve these problems (p. 278). The memorandum to which he referred was noted in the statement testimony of the Department of Treasury. The memorandum stated ABN

> is over two years delinquent in performance with a history of making commitments without adequate resources to fulfill

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[1] The executed contract also reflected the following additions to the initial ABN written offer: (a) provision that Sennett's services shall be performed in the Washington, D.C. area for 10 years, and (b) certain minimum supplemental benefits for his wife in the event he predeceases her.

> commitments. I believe a full review of the contract should be made in line with contractual requirements. After this review is completed and a plan of action formulated in line with production demands, I would recommend that the contractor be informed in detail of his obligations and consequential alternative actions under the contract (pp. 324–325).

Sennett said there was "a list of some 50 items that we felt needed to be resolved" (p. 378). His discussions on June 22 and 23 with D'Amato consisted of presenting the list and asking that ABN

> * * * give a submission of what you are going to do, who you are going to assign to do it, give us a whole time schedule and submit that to our contracting officer * * * (p. 328).

Sennett said there was no discussion of contractual matters or modifications to the contract (p. 380).

A letter of June 30, 1977, which D'Amato wrote to BEP's procurement officer, refers to the final meetings with Sennett and himself on June 22 and 23 and makes certain commitments to resolve the Magna press difficulties (pp. 167, 323). It is reasonable to infer that these commitments were the product of Sennett's participation in these meetings.

C. QUESTIONS CONCERNING THE PROPRIETY OF SENNETT'S CONDUCT

Sennett testified that after he received the ABN offer of employment he notified his superiors at BEP: Seymour Berry, the Acting Director, and Everett Prescott, the Acting Deputy Director (p. 380). Sennett's perception of the possibility of a conflict of interest was explored in a series of questions by Senator Cohen:

> Senator COHEN. Did it occur to you that there was a potential conflict of interest on your part?
>
> Mr. SENNETT. After I, when I received the offer? Yes. After I received an offer, certainly, there would have been.
>
> Senator COHEN. Even prior to your acceptance of that offer?
>
> Mr. SENNETT. Prior to the acceptance? Yes. Prior to my acceptance, yes, upon receipt of an offer, yes.
>
> Senator COHEN. You felt there was a potential conflict of interest?
>
> Mr. SENNETT. I didn't feel that it was a potential conflict of interest because I notified them. I did not participate any more.
>
> Senator COHEN. I understand. What I am saying is once you were made an offer, because of your position with the BEP and because of the relationship with ABN even prior to your acceptance of that offer, you felt there was a potential for a conflict of interest, which was one reason you notified these other two people. Is that what you said? Is that incorrect?
>
> Mr. SENNETT. Senator, I really don't know why—I cannot think back what my thought process was at that time. I am sure that I didn't think, oh, you know, there is a possible con-

flict, that is why I notified them, but I notified them out of, it is just what you would, what I would normally do.

Senator Cohen. Prior to your submission of resignation which I gather was around June 30 of 1977, roughly——

Mr. Sennett. Yes, sir (pp. 380–381).

In response to questioning by Senator Nunn, Sennett said he also notified Berry of his decision to go to work for ABN shortly after signing his contract perhaps the same day or at least within a few days (pp. 380, 383). He said he turned his BEP files on ABN to Prescott in one of the first few days in July (p. 383).

D. Analysis

Sennett's perception of a potential conflict of interest appears to have been formulated only after he received the written offer from ABN. As already noted, Sennett said this occurred on June 24, the day after the conclusion of the June 22–23 meetings with ABN's D'Amato concerning Magna press problems. However, Sennett had already had discussions with respect to prospective employment with ABN prior to the D'Amato meetings. Under these circumstances, Sennett's involvement in discussion concerning the Magna presses constituted at least an appearance of a conflict of interest. While Sennett said he "notified" his superiors that he received an "offer" from ABN, it appears that this notice was given *after* the June 22–23 meetings. In any event there is no evidence that Sennett received written permission to participate in any matter affecting ABN pursuant to the exemptive provisions of Section 208(b) of Title 18 of the United States Code.

At the time of the Subcommittee's hearings there was no evidence of any substantive involvement by Sennett in any matter affecting ABN subsequent to June 23. Sennett testified that after giving notice of the ABN offer he "did not participate any more" (p. 380).

The Subcommittee's appraisal of Sennett's conduct is contained in its Findings, Conclusions and Recommendations (Part VIII).

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V. POST-HEARING DEVELOPMENTS CONCERNING RICHARD SENNETT: CRIMINAL PROCEEDING FOR AN ALLEGED VIOLATION OF 18 U.S.C. § 208

Following the Subcommittee's hearings, on August 9, 1979, the Grand Jury for the U.S. District Court for the District of Columbia returned an indictment charging Sennett with violating 18 U.S.C. § 208. Count One of the indictment alleged, in pertinent part:

> In the period from in or about June 1977 through July 1977, * * * Richard Sennett, the Defendant, being an officer and employee of the executive branch of the United States Government, that is, an Assistant Director of the Bureau of Engraving and Printing, unlawfully and knowingly did participate personally and substantially as such officer and employee, through decision, recommendation, and the rendering of advice, in a controversy regarding Magna Press modifications, a particular matter in which to his knowledge the American Bank Note Company, a company with which he was negotiating and had an arrangement concerning prospective employment, had a financial interest.[1]

The indictment also contained two counts charging Sennett with false declarations in his testimony before the Grand Jury in violation of 18 U.S.C. 1623(a). Count Two alleges that Sennett falsely denied that he did not reach any agreement with Salvatore D'Amato of ABN with respect to the BEP's assuming responsibility for certain Magna press expenses. Count Three alleges that Sennett falsely denied that, a meeting at BEP on or about July 28, 1977, he expressed vehement opposition to the return of the Magna presses to American Bank Note Company.

On November 1, 1979, Judge Pratt dismissed the conflict of interest charge (Count One) against Sennett on the essentially same grounds that Judge Oberdorfer had dismissed the conflict of interest charge against Conlon. After the Government filed a notice of appeal, Sennett entered a plea bargain agreement pursuant to which he waived indictment and entered a plea of *nolo contendere* on November 30, 1979, to an information single count of violating 18 U.S.C. § 208. The information charges in pertinent part that:

> On or about July 28, 1977, * * * Sennett * * * being an officer and employee of the executive branch of the United States Government * * * unlawfully and knowingly did participate personally and substantially as such officer and employee, through his recommendation to the American Bank Note Company, in a controversy regarding Magna Press mod-

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[1] *United States* v. *Sennett*, Criminal Number 79-381 (D.D.C. 1979). A copy of the indictment is in Appendix K.

ifications, a particular matter in which to his knowledge the American Bank Note Company, a company with which he had an arrangement for employment as an executive of ABN Development Corp., had a financial interest.[3]

On January 11, 1980, Judge Pratt entered judgment of guilty and sentenced Sennett to one year's unsupervised probation and a $500 fine. The Judge also granted the Government's motion, pursuant to the terms of the plea bargain agreement, to dismiss the two false declaration counts against Sennett.

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[3] The information is contained in Appendix L.

VI. CONDUCT REGULATIONS OF THE TREASURY DEPARTMENT AND OTHER GOVERNMENT AGENCIES CONCERNING NEGOTIATIONS FOR EMPLOYMENT

The Department of the Treasury's Minimum Standards of Conduct refer to the criminal conflict of interest statute, 18 U.S.C. § 208, and set forth the ethical standards for employees. At the Subcommittee's hearings, Jordan Luke of the Treasury Department's Office of General Counsel testified that the Department's conduct regulations offer counseling to an employee who has a question concerning whether employment discussions would create an actual or apparent criminal conflict of interest or an appearance of impropriety. He also testified there was no specific requirement for reporting the receipt of an offer, job negotiations or an arrangement with respect to prospective employment with a firm having an interest in a matter for which the employee is responsible. However, Mr. Luke said that the concept of reporting employment discussions would be considered in its ongoing review of the Minimum Standards of Conduct.

A. MEMORANDUM OF THE TREASURY DEPARTMENT'S GENERAL COUNSEL

On July 16, 1979, the General Counsel of the Department of the Treasury issued a memorandum to Department employees concerning conflict of interest and prospective employment (Appendix B). The memorandum discusses 18 U.S.C. § 208 and contains an opinion interpreting the Minimum Standards of Conduct and Executive Order 11222 to require the reporting of certain contacts with respect to possible private employment.

1. DISCUSSION OF 18 U.S.C. § 208

The General Counsel's memorandum states that the 18 U.S.C. § 208 does not forbid an employee from seeking other employment while he or she is still with the Government, but

> it does require the employee to disqualify himself or herself from participation in any government action which may directly affect the prospective employer.

The memorandum notes that the Office of Legal Counsel of the Department of Treasury (OLC) has expressed the view that the phrase "arrangement concerning prospective employment" may include an informal or tacit understanding that the employee will join or return to a particular firm after his Government service. The memorandum further states that

> Although the term "negotiating" connotes discussions and active interest on both sides, OLC has taken the position that

> it is at least arguable, however, that the prohibition in 18 U.S.C. § 208(a) was intended to have a broader reach, encompassing some situations in which the Federal employee or the prospective employer has made a unilateral expression of interest.

In contrast to OLC's suggestion, Judge Oberdorfer in his opinion concerning his dismissal of the Section 208 count of the indictment against Conlon, indicated that this section was not intended to punish "indefinite and inchoate links to outside firms such as unsolicited offers of future employment" * * * (Memorandum, p. 15). However, as noted above, the Court of Appeals apparently rejects this view, holding that the "Congress meant the words 'negotiating' and 'arrangement' in Section 208(a) to be given a broad reading, rather than the narrow reading accorded them by the district court." (Court of Appeals Opinion, p. 10) In this connection, the Appeals Court noted that 18 U.S.C. § 208(b) provides a mechanism "whereby an employee can obtain from his superior an exception from § 208(a) for *de minimus* situations." (Opinion, p. 8.)

Even if the courts interpret these terms restrictively, this would still not preclude Federal agencies from applying a broad reading of these terms to their non-criminal conduct regulations. Indeed, these regulations are intended to keep employees well clear of conduct that might raise a question about compliance with 18 U.S.C. § 208.

2. ETHICAL STANDARDS

The General Counsel's memorandum points out that the Treasury Department's Standards of Conduct also address the conflict of interest issue, but in more general terms, by prohibiting, among other things, "giving preferential treatment to any person, losing complete independence or impartiality, and affecting adversely the confidence of the public in the integrity of the Government." These principles are contained in the Government-wide enabling ethics regulations, Executive Order 11222.

Reporting and Disqualifications

In the General Counsel's opinion—

> * * * if an employee receives an offer of employment which he or she is not, at that point, prepared to reject, or is engaged in active negotiations with a prospective employer, that employee should promptly act to insulate himself or herself from any further action with respect to the offering organization by asking his or her supervisor and subordinates that no further matters pertaining to the organization be referred to him or her.
>
> The type of matter in which the employee must refrain from participating includes both particular matters (e.g., negotiation of cases or contracts) and general matters (e.g., the review of a regulation affecting national banks), if such matters have a direct and substantial effect on a prospective employer.

Section 208 does not specifically require a Government employee who disqualifies himself to report the fact of his disqualification to his superiors. However, such a report is the implicit administrative obligation of the Government employee, which should be expressly recognized by Federal agency conduct regulations which supplement Section 208. The General Counsel's opinion interprets the Treasury Department's conduct regulations to require such a reporting procedure. This procedure should have the beneficial effect of making a record that the disqualification actually occurred and thereby obviate any questions that could be raised at a subsequent time.

It should be noted that the Ethics in Government Act of 1978 (Public Law 95–521) requires executive branch personnel at the level of GS–16 or above to make annual public financial disclosures. Any person covered by the law must file a report within 30 days of assuming his position; annually thereafter on or before May 15 of each year; and upon termination of employment, covering the portion of the year worked since the date of the last report. (Section 201 (a), (d)) The reports must contain, among other things, "a description of the date, parties to, and terms of any agreement or arrangement with respect to * * * future employment." (Section 202(a)(7)(A))

Section 207(a) of the Act authorizes the President to require executive branch employees below the GS–16 level to submit confidential reports in such form as is required by the Act.

Section 207(c) of the Act states that the provisions of the Act requiring the reporting of information shall supersede any general requirement under any other provision of law or regulation with respect to the reporting of information for purposes of preventing conflicts of interest. It does not appear that this provision is intended to limit the President's authority, upon which Executive Order 11222 is based, to require Government personnel to make confidential disclosures of offers of employment and negotiations, provided that the disclosures do not duplicate those specified in Section 202(a)(7)(A). This is the position taken by the Department of the Treasury in a letter to the Subcommittee on January 31, 1980 (Appendix B).

Reporting of Certain Offers of Employment

The opinion of the Treasury Department's General Counsel also establishes a new requirement for the reporting of some offers of employment, even if the affected employee does not believe disqualification is warranted. The purpose of the notice requirement is to "* * * protect the integrity of its [the Department's] decisionmaking processes by making an independent judgment."

The opinion provides that, if an employee accepts an offer of employment, whether unconditionally or otherwise, conscientious adherence to the Treasury Department's Minimum Standards of Conduct and Executive Order 11222 requires immediate disclosure of the acceptance and the identity of the future employer to the employee's supervisor.

The opinion does not establish a requirement that all offers of employment be reported because of "the possibility that some employees might be concerned about impairment, whether real or imagined, of their futures in the Department." If an offer of employment is rejected immediately, or within 3 working days, *and* the employee has not participated in any activity of possible interest to the potential employer during that period, there is no automatic requirement that the offer be reported. However, the opinion states that

> Where an offer of employment has been made, or active negotiations have begun, and the employee has deferred a decision, a more flexible line that takes into account the nature of the employee's responsibilities is needed. If any matter in which the potential employer appears to have an interest is, or has been assigned to the employee who has received the offer, or who is actively negotiating, that employee must give prompt notice.[1]

The opinion indicates that the employee receiving an offer from a firm which has an interest in a pending matter in which the employee is participating need not report the offer if it is rejected soon after it is received. Thus, the opinion fails to take into account that an offer under these circumstances is a significant and sensitive matter which should be reported by the employee.[2] Absent such a procedure there is no effective way to insulate the employee and the Government from potential allegations of impropriety.

The reporting procedures appear designed to address only offers of and negotiations for employment. They do not specify how definite the offer or negotiation must be before the employee must give notice. In order to achieve the objective of prompt reporting employees should be advised to report any indication by a firm of an interest on the part of the employee in discussing employment.

In addition, the reporting procedures are predicated implicitly on the assumption that the offer or negotiation is initiated by the prospective employer. It would appear that guidelines and procedures should be specially tailored to address such a situation. In this connection, the initiation of an employment contract by a Government employee with a firm which has an interest in a matter in which the employee is participating would appear to be improper and on the basis of OLC's opinion, may violate 18 U.S.C. § 208, unless the employee disqualifies himself. To avoid potential problems in such a situation, the employee should seek permission prior to initiating any contacts.

B. GAO Report on Ethics Standards in Other Government Agencies

On October 18, 1979, the U.S. General Accounting Office issued a report titled, "Federal Agency Standards of Employee Conduct Need Improvement." The report shows that the Department of Treasury was only one of several Government agencies which needed to improve its conduct regulations for employment. The report contains the results of GAO's review of the standards of conduct of six agencies (not including Treasury)[3] with respect to negotiating for employment and certain other issues. The GAO found that the basic philosophy underlying the application of standards of employee conduct places the primary responsibility on employees to know and abide by standards, while agencies assume a passive role usually only reacting to employee initiatives. GAO said the agencies generally had not taken sufficient action to evaluate the effectiveness of their standards. It also found that the then Civil Service Commission (now Office of Personnel Management (OPM)) guidance to agencies on developing standards was not adequate to minimize variations in the behavior expected of employees from different agencies. In this regard, GAO believes that differences not based on specific statutes or special duties should be minimized and that the conduct of employees of one agency with respect to possible conflicts of interest should not vary substantially from that of another agency.

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[1] The opinion would permit (1) the employee to report the offer to an ethics counselor for advice whether he must notify the employee's supervisors, and as to (2) the ethics counselor to withhold any information from the employee's supervisor in any instance in which the counselor advises that the offer of employment need not be reported.

[2] It is hard to conceive how an employee could have any concern about reporting to his supervisor or an ethics counselor the receipt of an unsolicited offer which is promptly rejected.

[3] The agencies were: The Department of the Interior, National Science Foundation, Environmental Protection Agency, National Aeronautics and Space Administration, the Department of Health, Education and Welfare, and the Department of Housing and Urban Development.

Executive Order 11222 directs agency heads to provide employees with clear standards of ethical conduct and with guidelines and interpretations needed to relate those standards to individual situations. GAO found that agency standards were often very general, merely repeating the general standards contained in Executive Order (GAO report, p. 25).

According to GAO, some agencies have specific reporting requirement in the area of negotiating for employment, while others rely on their employees' reading and understanding of 18 U.S.C. § 208. Similarly, one agency defined negotiating as any employment contact, and another allows employees to submit resumes to outside organizations and only considers an employee as negotiating when the prospective employer has indicated serious interest. Other agencies had not provided guidelines on what constitutes negotiating (GAO report, pp. 7, 21).

GAO recommended that implementing regulations under Executive Order 11222, at a minimum, address:

1. Actions which would constitute negotiating for employment.
2. Specific policies describing limitations and restrictions on negotiations.
3. Procedures to be followed when negotiating for employment to assure that a conflicting situation does not arise (GAO report, p. 7).

C. SANCTIONS FOR VIOLATING ETHICS REGULATIONS

The conduct regulations of the Treasury Department provide that, in addition to any penalty, disciplinary action may be taken against an employee who violates these regulations (31 C.F.R. § 0.735–3). The regulations state that:

> * * * Remedial action may include, but is not limited to:
>
> (1) Changes in assigned duties.
>
> (2) Disqualification for a particular assignment.
>
> (3) Divestment by the employee of his conflicting interest.
>
> (4) Disciplinary action. (31 C.F.R. § 0.735.3(b))

Difficulty may arise in attempting to pursue these remedies in cases of violations of conduct regulations which occur in the course of an employee's successful search for private employment. For example, if in the course of seeking such employment, the Government employee fails to report an offer of employment for a private firm doing business with his agency and subsequently goes to work for that firm, the Government no longer has direct control over the employee. It appears that the agency, after notice and opportunity for a hearing,[4] may be able to impose a "disciplinary sanction" in the form of a prohibition on or suspension from appearance before the agency.

GAO further recommended that the Office of Personnel Management raise the implementing regulations for Executive Order 11222 to

1. Strengthen the guidance on standards to minimize varying interpretations among agencies.
2. Require agencies to review and evaluate the effectiveness of their standards, including employee compliance, agency enforcement, and needed improvements.
3. Foster a basic change in the passive philosophy underlying implementation of the standards (GAO report, p. iii).

The Subcommittee endorses the views and recommendations of the GAO. In implementing GAO's recommendations, Federal agencies should carefully consider the record of the Conlon and Sennett cases, the Treasury Department's General Counsel's memorandum, and the Subcommittee's recommendations (see Part VIII of the report).

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[4] In this connection, the Treasury Department's regulation provides that "If disciplinary or other remedial action is necessary, it will be taken only after consideration of the explanation of the employee and will be affected in accordance with applicable laws and regulations."

VII. MISMANAGEMENT AND INEFFICIENCY IN BEP'S OPERATIONS

The Subcommittee's hearings also examined a number of problems in the business operations of BEP. The problems covered a wide variety of topics, including procurement practices, financial accounting and audit systems, labor shortages and equipment malfunctions, and increasing costs of currency and other BEP products.

A. PROCUREMENT PRACTICES

In its review of the operations of BEP, the Subcommittee devoted most of its attention to deficiences found in BEP's procedures for the procurement, production, and distribution of food coupons. Since 1971, BEP has contracted on behalf of Department of Agriculture, for the printing and later the distribution of food stamp coupons, to ABN and later also to United States Banknote Corp. ("USBN"). This has been a major procurement activity, involving the award of over $115 million in contracts between 1971 and 1978. A report by the General Accounting Office [1] showed that, of the food coupon contracts awarded to ABN and USBN, several negotiated contracts did not contain sufficient documentation to permit reconstruction of the process which preceded the awards. GAO further found that "absence of pre-award audits and lack of evaluations of cost proposals in some cases, indicate that the Bureau did not avail itself of some important contract management tools." The Bureau also failed to perform certain functions such as making some form of price or cost analysis and documenting the elements of price negotiations that are required by Federal Procurement Regulations.

BEP did not perform its first audit of actual costs incurred by ABN on a completed contract until September 1977. This BEP audit report showed that percentage profits for ABN on production contracts number TEP-75-206(TN) and TEP-77-1(TN) ranged from about 26 percent to 37 percent on the former and from about 18 percent to 33 percent on the latter (p. 16, exhibit 1). The report said that—

> * * * These percentages appear to be somewhat excessive since the prevailing contract prices were proposed and accepted based on a 16 percent profit for production * * * under both contracts.
>
> This matter was brought to the attention of the Chief, Office of Administrative Services, for possible use in future negotiation (Exhibit 1, p. 16).

GAO also found similar spreads between the estimated profits at the time of the award and actual profits on prior ABN contracts.[2]

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[1] The report consists of two letters from Comptroller General Staats to the Subcommittee, dated September 1978 and April 1979, respectively (exhibit 3).

[2] Only one of the prior contracts was awarded on the basis of advertising, in response to which ABN submitted the only bid. All other contracts were awarded on a negotiated basis.

Instead of applying the audit information to future negotiated procurements, BEP began awarding contracts on the basis of advertised competitive bids (p. 317). BEP did not supplement its analysis of these bids with negotiations taking into account cost information submitted by ABN and U.S. Banknote. ABN generally underbid USBN, except on the printing of one style of food coupon books (p. 556). While advertised bidding is the preferred method of awarding Government contracts,[3] this method assumes the existence of adequate price competition.[4] The GAO said that BEP used the advertising method on the premise that both ABN and USBN have the capacity to print the quantities needed. GAO noted, however, that USBN has never printed more than 25 percent of the annual food stamps coupons required and has never been awarded any of the distribution work.

GAO's analysis shows that the bids submitted by ABN and USBN on the first production contracts awarded after the advertised solicitation of bids were fairly close. The analysis also shows that ABN's profits on the first completed advertised contract (Number 78–1) were 33.6 percent and 42.1 percent for production and distribution, respectively (pp. 48–49). The percentage profits earned by USBN on the advertised contracts awarded to it were not determined. However, profit ratios obtained by USBN on prior negotiated contracts were much lower than those earned by ABN on negotiated contracts in corresponding time periods.

GAO noted that, at present, only ABN has the capacity to store and distribute printed coupons. USBN officials told GAO that they would have to obtain suitable facilities, equipment and personnel to carry out these functions (p. 30).

BEP officials told GAO that the determination that adequate competition existed was valid because USBN could print the full quantity of food stamp coupons. However, BEP officials acknowledged that for USBN to do so, its commercial business might have to be reduced (p. 31).

GAO did not attempt to assess whether adequate competition existed for any food coupon contracts awarded by BEP on a straight advertised basis. However, the Department of Treasury's Chief of Procurement wrote to BEP on April 14, 1978, recommending that BEP explore ways of returning to the negotiation of food coupon contracts, rather than straight formal advertising, because the negotiated contracts permit the Government to have certain advantages: i.e., the right to audit, to demand cost and price data, and to "haggle" over bids (pp. 345, 346). In this connection, John Buck, Chief of Treasury's Management Analysis Division, pointed out that it is questionable whether USBN has the capacity to be a full competitor (p. 346).

The Department of Treasury examined the aforementioned food coupon contracts to determine whether the Government could recoup any amounts in excess of the profits determined on the basis of the

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[3] Federal Procurement Regulations, 41 C.F.R. 1–2.102. The regulations authorize government agencies to negotiate after receipt of bids obtained on the basis of formal advertising where some of the bids do not appear reasonable (41 C.F.R. 1–3.214).

[4] The Federal Procurement Regulations authorize government agencies to enter contracts through negotiation if it is impractical to secure competition by formal advertising (41 C.F.R. 1–3.210). Factors to be considered in negotiating contracts include comparison of prices quoted and considered of other prices quoted for similar property or services with due regard to production costs and profits and comparison of the capacity of respective firms which submit offers (41 C.F.R. § 1–3.802).

ABN costs estimated at the time of the award (pp. 39, 317).[5] Federal Procurement Regulations permit the Government to obtain recovery based upon defective cost information, if the information furnished by the contract was relied upon in making the award. The Department of Treasury recently concluded that it could not seek recovery from ABN on this basis because BEP could not document that it had relied upon the cost information submitted by ABN in making the awards in question (Appendix B).

ABN told the Subcommittee that it believes that the wide variation between estimated and actual profits was the result of improvements in efficiency and to frequent and material changes in volume requirements (pp. 527, 529, 530). The GAO analysis indicates that such volume changes did occur. However, BEP approved contract changes apparently without re-examining the cost impact or negotiating any reduction in unit price (p. 45).

On the basis of the limited record, the Subcommittee cannot conclude what particular price may or may not be reasonable. However, it does appear that BEP failed to bargain knowledgeably and effectively and thus, was not in a position to secure for the Government the lowest possible price on the food coupon contracts awarded on a negotiated basis. The reasonableness of BEP's use of the straight advertising method of awarding food coupon contracts cannot be determined since the Department of the Treasury has not completed an assessment of the adequacy of competition.

The GAO findings were basically in accord with those in a report by the Office of Audit in the Office of the Secretary of the Treasury. In addition, the Office of Audit found that deficiencies similar to those in the food coupon procedures generally existed in all of BEP's procurement activities (exhibit 4).

The Treasury Department has advised that the Department of Agriculture has taken full responsibility for procurement of food coupons beginning with fiscal year 1980 (Appendix B). The record of this case should be helpful to the Agriculture Department's efforts in assuring that its food coupon procurement program comports with the Federal Procurement Regulations and good contract management practice.

B. Financial Accounting and Audit Systems

John Buck of the Treasury Department testified that the management study team which he headed found BEP's cost accounting and payroll systems to be

> * * * outmoded, cumbersome, largely manual and therefore very slow, expensive because of being labor intensive and incapable of providing timely management information to the Bureau's top staff.
>
> Also, this outmoded system has been overwhelmed by increasing volumes of things to keep track of and increasing administrative requirements, on what to report, to whom, and

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[5] ABN also indicated that it did not believe that its profits were unusually high in light of the fact that its physical plant equipment is fully depreciated, thus lowering its costs. ABN said it would have reported substantially lower profits if it was allowed to take expense for plant and equipment on the basis of their current replacement cost (pp. 54, 529–530, exhibit 3B). However, GAO pointed out that replacement cost accounting may not be used to determine the costs under Federal Procurement Regulations (p. 41).

in how many copies. It has broken down under that pressure. It is incapable of giving very accurate cost or payroll data (pp. 204, 356; exhibit 8).

C. LABOR SHORTAGES, EQUIPMENT MALFUNCTIONS, AND OTHER PROBLEMS

The management study referred to by Buck also found that misalignment, duplication and overlap of functions may have existed at BEP; that the entire overhead structure of BEP needs to be reviewed; and that BEP needs to reduce overtime work and improve its work and production measurement systems, particularly for overhead activities and for overall work measurement; and that thorough cost-benefit analyses should be made to justify all major equipment purchases (pp. 211–212, exhibit 8).

The management study points out that from fiscal year 1974 to fiscal year 1978, the direct labor work force of BEP declined by 374 positions. During the same period, overhead employee positions increased by 274 (exhibit 8).

The study attributed the decline in the direct labor work force to "declining workload and the shift toward capital intensity," but also pointed out that BEP must use large amounts of overtime to meet its production workload and that it has even consistently been under its reduced direct labor force ceiling (exhibit 8).

The shortages of skilled plate printers have necessitated three work-shifts, seven days per week, and excessive overtime work at a premium wage (pp. 214, 547–555). An affidavit submitted by officials of the Washington Plate Printers Union pointed out that, at the time of the hearing, BEP was 23 plate printers below its authorized level of 136, a 17 percent shortfall (p. 549). The union stated that, "The excessive amount of overtime has unquestionably contributed to the poor safety record of the Bureau" (p. 549).

An April 19, 1979 article in the *Baltimore Sun* indicated that disabling work injuries at BEP, which has about 3,000 workers, resulted in a total of 8,910 lost workdays in 1979, whereas the Government Printing Office, which has twice as many employees, lost 1,000 fewer workdays because of accidents or job-related illnesses (p. 359).[6]

Acting BEP Director Clements did not dispute the accuracy of the data, but asserted that the comparison between BEP and GPO was not valid because BEP specializes in the intaglio process. He suggested that BEP's safety record would compare favorably with private bank note houses which use the intaglio process (p. 361). However, he never produced any data to support his contention. In any event, BEP's safety record is poor by any measure and warrants substantial improvement.

Treasury Department management has acknowledged that shortages of personnel, equipment, and space are a problem (pp. 214, 215). The major equipment problem consists of malfunctions in the Magna currency printing presses. BEP has experienced a relatively high downtime and spoilage rates with these machines (pp. 313, 320, 321, 540, 547). Treasury Department management indicated that the Magna press problems have been another contributing factor to overtime and other costs which are ultimately reflected in BEP's rising costs of currency and other products, although no specific amounts could be determined (pp. 313, 320, 321, 352, 353).

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[6] The *Sun* article said that BEP's safety record was even less favorable when measured against the printing industry as a whole which in 1977 reported only 40 lost work days for each 100. In the same year, BEP's rate was 9 times higher—365 work days for each 100 workers.

Another constraint on BEP is that it has not had borrowing authority and, thus, has had to resort to an expensive lease-to-purchase agreement to acquire new presses as part of its equipment modernization program. GAO has recommended that BEP be given statutory borrowing authority and the Treasury Department has requested that legislation be drafted and submitted to the Office of Management and Budget (pp. 312, 313).

The cost of producing currency has risen from $11.92 to $18.70 per 1,000 notes from fiscal year 1971 to 1978, an increase of 55 percent. The increases have prompted the Federal Reserve Board to make periodic expressions of concern to BEP about these costs (pp. 312, 535). Data supplied by the Department of Treasury showing a breakout of cost increases from fiscal year 1976 to 1978 shows that administrative and support costs have increased at a much faster rate (24 percent each) than direct manufacturing costs (13.7 percent) (pp. 321, 348).

Increases in BEP's cost of printing postage stamps also contributed to a recent decision by the U.S. Postal Service to solicit competitive bids on a contract for the printing of a commemorative stamp in order to determine if more favorable prices could be obtained than those being charged by BEP. The award was made to a joint venture between ABN and J. W. Fergusson and Sons of Richmond, Virginia. BEP did not bid on this contract. The Postal Service said that the successful ABN/Fergusson bid was $1.97 per thousand, which compares to BEP unit charges of $2.25 and $2.40 per thousand for two previous commemorative stamp issues (p. 213, exhibit 10). While this data is not necessarily reflective of how BEP would fare in a direct competition with private firms, it does raise a serious question about its efficiency relative to private firms which must also make a profit when printing stamps. This matter should be carefully examined by the Treasury Department.

In the Subcommittee's hearings a question arose whether, if BEP had the capacity to produce food coupons, it could do so at a lower cost than the price charged by private firms to whom BEP let contracts. In its report, GAO stated that BEP estimated that it could produce fiscal year 1978 food coupon needs at 12 to 28 percent less than either of the private contractors—if it had the capacity to perform, which it does not (pp. 26–27). Since these figures are based upon projected costs and quantities they are of questionable reliability.[7] Former BEP Director James Conlon testified that he persistently sought a modification of an OMB directive which required BEP to contract out because he felt BEP could produce food coupons cheaper.

It is interesting to note that in the first two food coupon contracts let to ABN in 1971 and 1972, the contract price was based on BEP's charges to the Department of Agriculture.[8]

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[7] Since fiscal year 1975, BEP has not produced the same denomination as either ABN and USBN, thus, precluding direct comparison of actual costs because of the multiplicity of variables; e.g., differing portions of labor and materials, and types of coupon books (p. 26).

[8] As noted above, the Department of Agriculture stipulated that private contractors' prices could not exceed BEP's charges to Agriculture. Prices on contracts subsequent to 1972 were negotiated on the basis of cost data (p. 45), until BEP began to award contracts on the basis of advertising in 1978 (p. 45).

While BEP's prices to Agriculture were based upon its estimated costs (i.e., no profit), ABN realized profits of 13 percent and 14.6 percent on the 1971 and 1972 contracts (p. 48).[9] Perhaps BEP is more efficient today than it was in 1971 and 1972; or, maybe its 1971–1972 costs were not accurately determined because of flaws in its cost accounting system. A comprehensive appraisal of the costs of BEP's operations is in order to understand the troubling paradox of a private contractor making 13 to 14 percent profits on prices reflecting BEP's costs.

D. Treasury Department Response

In commenting on BEP's performance, Under Secretary Anderson noted that BEP had been managed for many years by personnel, the majority of whom were not trained as managers, but achieved their positions on the production side. In 1978, she found the management functions "extremely weak," resulting in part from the "one-man band" management style during James Conlon's 10 years as Director, which failed to develop a new generation of managers (pp. 312, 355). She also attributed the problems to the inability in recent years "to generate the moneys, to do the things and employ the people that he needed based on his forecast and the utilization of people * * *" (p. 355).

The record also demonstrates that main Treasury must share the responsibility for BEP's current problems. As Under Secretary Anderson pointed out, prior to 1977, BEP's operations were largely unsupervised by main Treasury (pp. 312, 350, 351). The degree of autonomy exercised by BEP was reflected by Conlon's actions in attempting to commit the Treasury Department to an anti-counterfeit policy decision without receiving any advice or explicit approval from senior Treasury officials.

The Department now seems committed to asserting managerial control over BEP. The Subcommittee was encouraged by the testimony of Under Secretary Anderson and Acting BEP Director Harry Clements expressing the Treasury Department's and BEP's determination to remedy the foregoing problems. Over the last two years, the Treasury Department has taken a number of constructive steps. In the procurement area, in July 1977, the Department established a requirement for both a legal review and review by the Office of the Secretary of all BEP contract solicitation documents on contracts exceeding $100,000 (pp. 314, 316). In January 1979, procurement authority was temporarily withdrawn from the Director of BEP and delegated to the Director, Office of Administrative Programs, in the Office of the Secretary (pp. 315, 316). The Treasury Department said that—

> Since these measures were instituted, there has been a general improvement in the contract placement activities of BEP, with greater assurance that requisite contract clauses are included and that procurement regulations are followed with respect to solicitation procedures and contract file documentation.

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[9] As a result of cost reducing efficiencies and high volumes, ABN has earned even higher profits on subsequent production contracts ranging from 22.2 percent to 33.6 percent.

Acting BEP Director Clements assured the Subcommittee that BEP will have some measure of cost effectiveness on every future major buying action; pre-award cost analyses prior to contract awards; and stringent auditing of contracts (p. 330).

Following the Subcommittee's hearings, the Treasury Department conducted a further review of BEP's procurement practices. A September 1979 report following up the April 1979 management review made a number of recommendations for additional improvements which BEP is implementing (Appendix B).

In a subsequent detailed review of the April 1979 management study, the Treasury Department found that "almost all BEP functions were well delineated, although some restructuring appeared warranted due to changes in management emphasis and other concerns." In this connection, the Treasury Department reports that the Internal Audit function of BEP has been broadened and an Office of Quality Assurance has been established for production and administrative functions. The responsibility for production equipment planning, various types of cost benefit analysis and "make or buy" evaluations have been combined into a newly established Operations Analysis Staff (Appendix B).

The Treasury Department also reports that it is initiating a productivity study of overhead areas and making a concentrated effort to automate the manual and administrative function to reduce costs and personnel. In addition, the Department reports that overtime has been substantially reduced in administrative and support areas. However, the Department believes that, given the constraints of BEP's facilities and equipment and the fixed skilled labor study, overtime is unavoidable in the craft categories. In this regard, the Department states that it is continuing craft staffing and apprenticeship programs with the objective of achieving a normalized 5 day week in most production areas (Appendix B).

A major followup to the April 1979 management study consists of a 4-year program to develop a Financial Management Information System to supplant its obsolete labor-intensive operation. BEP is in the process of obtaining the services of an outside accounting systems contractor to assist in the analysis and conceptual design of the system (Appendix B).

The Treasury Department has also established a Task Force on Counterfeit Threat Assessment. That group is headed by Secretary for Enforcement and Operations, and representatives of BEP and Secret Service, and responsible for ongoing study of potential threats to U.S. currency and proposals to combat these threats (pp. 313–314). The Department has provided for participation by the Federal Reserve Board and defined the respective responsibilities of the participants. This is a much needed response to the confusion that had existed for several months about the relative roles of Treasury and the Federal Reserve concerning ABN's Security Signature System proposal.

The Treasury Department also has a number of other ongoing projects designed to review and implement the recommendations of April 1979 BEP management study. These matters are discussed in more detail in Appendices B & M.

In order to achieve the desired improvements in BEP's procurement, financial and audit systems and other aspects, main Treasury must continue to play an active role.

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VIII. FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS WITH RESPECT TO CONFLICT OF INTEREST MATTERS

A. Findings and Conclusions

1. *James Conlon failed to adhere to the high standards expected of Government officials by engaging in conduct which created an appearance of a conflict of interest and which, in some respects, constituted serious actual improprieties.*

In November 1976, James Conlon, Director of BEP, received an offer of employment to become President of American Bank Note Company (ABN), from Edward Weitzen, Chairman of ABN. Both men say the offer was immediately rejected and was not left open by ABN. ABN was then BEP's major outside contractor. It printed food coupons for BEP and had supplied it with currency printing presses. From the time of the ABN job offer in November 1976 through June 1977, Conlon and BEP were actively engaged in the consideration of a proposal to acquire ABN's anticounterfeit system, the Security Signature System ("SSS").

Soon after he made the November 1976 offer of employment, Weitzen asked Conlon to look into the availability of space for a branch office ABN planned to open in the Washington, D.C. area. Conlon did so and, in the period November 1976 to February 1977, spent a substantial amount of time locating and designing the office space. These activities created an appearance that Conlon was negotiating or had an understanding with respect to future employment with ABN. Conlon later occupied these offices after he became President of ABN's subsidiary, ABN Development Corporation, on July 2, 1977. Most significantly, Conlon continued his participation in the SSS matter, even after June 10, 1977, when he acknowledged to the Subcommittee that he had entered into an oral agreement with respect to employment with ABN. This agreement was formalized in a written contract executed on June 27.

Conlon did not tell his superiors in the Department of the Treasury about the existence of the November 1976 offer nor did he tell them of his June 1977 negotiations. He took no other action to insulate himself from potential allegations of impropriety.

While denying any misconduct, Edward Weitzen acknowledged in his testimony that the sequence of events and circumstances created an unfortunate appearance of conflict of interest which he found personally embarrassing and regrettable. Weitzen said that the hearings made him appreciate that appearances form the basis of judgments and that, if he had it to do over again, he probably would not have hired Conlon in June 1977.

What was plain to Weitzen in hindsight should have been apparent to Conlon as the events were occurring. A Government employee is held to strict standards. At a minimum, he is prohibited by criminal statute from participating personally and substantially in any matter in which an organization, with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest (18 U.S.C. § 208(a)). But the obligation of public officials extends beyond the avoidance of criminal conflicts of interest. As the Department of Treasury's Minimum Standards of Conduct point out, an employee must avoid "any action, whether or not specifically prohibited * * * which might result in, or create the appearance of * * * using public office for private gain, giving preferential treatment to any person; * * * losing complete independence or impartiality; or affecting adversely the confidence of the public in the integrity of the Government" (31 C.F.R. 0.735–30). These basic principles are designed to assure that the public has complete confidence in the integrity of Government (Executive Order No. 11222, 30 F.R. 6469, May 5, 1965). They are designed to avoid not only abuse of Government office for private financial gain, but any conduct that tends to reflect unfavorably on the fairness of Government practices and procedures.

An "appearance" of a conflict of interest or impropriety occurs when a Government official engages in conduct which outwardly seems to be a violation of law or the criteria cited in the conduct regulations. An employee who places himself in a position where a legitimate question may be raised as to whether he had complied with these obligations creates such an appearance, even if there is no *actual* misconduct.

There is an important practical reason for adherence to these high ethical standards. A department or agency of Government cannot deal effectively with its substantive responsibilities if there is a question about the fairness of its procedures and practices. Preoccupation with investigations by law enforcement officials and Congressional committees diverts resources. A question about conduct of one official as to one particular matter prompts questions about all of his official actions, and those of the agency generally. There is easily created an atmosphere of distrust and suspicion that can cripple or severely impair the functioning of Government.

The Subcommittee received testimony, which indicated that Conlon may have had an arrangement with respect to, or may have been negotiating, prospective employment with ABN from November 1976 to June 10, 1977.[1] This testimony is disputed by Conlon and Weitzen. Even if Conlon is given the benefit of the doubt on these disputed issues, it is clear that his conduct constituted an appearance of conflict of interest or other impropriety. Moreover, certain aspects of Conlon's conduct, particularly his favorable official action on ABN's SSS proposal after he agreed on June 10 to go to work for ABN, constituted serious improprieties. This impropriety was borne out subsequent to the Subcommittee's hearings when Conlon was convicted of having committed a criminal conflict of interest in violation of 18 U.S.C. 208.

a. November 1976 Offer of Employment

As a public official engaged in the consideration of the acquisition of ABN's SSS, Conlon should have been concerned about the appearance of impropriety of Weitzen's offer of employment in November 1976 even if, as he and Weitzen testified, the offer was immediately rejected. Weitzen felt he had *bona fide* business reasons for seeking

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[1] For example, Gary Transtrum, the office rental agent with whom Conlon dealt, testified that Conlon told him in November 1976 that he (Conlon) was going to go to work for ABN as a Vice-President and pointed out where he wanted his personal office located in the office floor plan. Also, Under Secretary of the Treasury, Bette Anderson, testified that Conlon informed her in late May 1977 of his intention to retire, which contradicted Conlon's testimony that his decision to retire was made "spontaneously" on June 2, 1977 and tended to support an inference that Conlon had plans to work for ABN prior to June 2.

Conlon's services. The law does not prohibit private businesses from making offers of employment to officials in Government agencies with whom they are doing business. If an unsolicited offer is immediately rejected by a Government employee, it does not appear that 18 U.S.C. § 208 would mandate disqualification. However, the ethical rules applicable to Conlon required him to avoid any conduct that might create or result in the appearance of losing complete independence, giving preferential treatment, or adversely affecting the confidence of the public in the integrity of the Government. The circumstances surrounding ABN's offer to Conlon indicated that it would have been prudent for him at least to have sought independent counselling that was available in the Department of Treasury. The following factors would have suggested the advisability of Conlon's disqualification from further participation in the SSS project or any other matter in which ABN had an interest:

First, Conlon had the ultimate responsibility for making the controlling technical judgments on whether to acquire SSS. BEP would have the responsibility for the procurement of the SSS equipment. The acquisition of a new anti-counterfeit system was a sensitive proposition. Conlon said he was flattered by Weitzen's offer of the presidency of ABN, the second highest office at ABN. Even if rejected, the offer demonstrated to Conlon that ABN might have an interest in employing him in the future. Thus, there was a risk that, if the Government were to acquire the SSS, questions might later be raised whether the key judgments of Conlon may have been compromised because he had his eye cocked toward future employment possibilities with ABN.

Second, apart from the potential adverse effects of the offer itself. there was a reasonable possibility that Conlon could find himself in an awkward position negotiating for employment with ABN within several months after the offer was made. Conlon testified that, at the time he received the offer, he was contemplating retiring from BEP in about a year and then seeking employment in the private sector in one of the securities manufacturing areas. He said "common sense dictated" ABN would be a potential employer, since there were only a small number of private firms that could utilize his highly specialized expertise.

Third, as Director of BEP, Conlon had official responsibility for BEP's relationship with ABN concerning food coupons and Magna press contract matters. It does not appear that Conlon was personally involved in these matters from November 1976 to the time of his retirement. However, since BEP is a small agency, it would have been possible for an issue concerning these ABN relationships to have come to the Director's attention at any time. The public is not aware of what functions the Director may personally perform or delegate and thus may attribute actions and policies of subordinates to the Director.

If the foregoing factors did not justify disqualification. they clearly warranted independent scrutiny by Conlon's supervisors in the Treasury Department. Of course, such a review cannot occur unless triggered by the reporting of the offer, a procedure that was not required by the Department of the Treasury's conduct regulations.

As noted above, Conlon's suggestion that there was no basis for an appearance problem with ABN because nobody knew about it besides himself and Weitzen displays a gross disregard of the standards of conduct expected of Government employees. Every matter in which a Government employee is involved with a firm doing business with his agency is a public act. As Thomas Jefferson said, "When a man assumes a public trust, he should consider himself a public property." The appearance of impropriety of what was initially a "private" transaction may be created when it is subsequently disclosed and the sequence of events causes the public reasonably to question whether a conflict of interest or an impropriety has occurred.

b. Location and Design of Office Space for ABN

Even accepting Conlon's testimony that his location and design of ABN's office space was a personal favor and act of courtesy to ABN, such conduct is still contrary to the intent of the Government's ethical standards. Conlon testified that he had never performed such a favor for any other BEP private contractor. More importantly, Conlon performed services that a private firm would and should have its own employee or agent perform and for which they receive compensation. The Subcommittee believes that the performance of such a favor by a public official for a firm doing business with his agency is inherently improper.

Considered in isolation from the November job offer from ABN, Conlon's actions created an appearance of (1) giving preferential treatment to a firm which had existing and proposed contracts with BEP; (2) losing independence and impartiality with respect to business dealings with ABN, including the SSS, as well as other matters within his official responsibility; and (3) currying favor with a potential future employer, and thus, appearing to use his public office for private gain.

What makes Conlon's "act of courtesy" particularly egregious is that it began so close in time to when, according to his testimony, he declined the November 1976 offer of employment with ABN. Even discounting statements attributed to Conlon by Gary Transtrum, the office rental agent who dealt with Conlon, Conlon's involvement created the appearance that he was helping to set up a local office as a prelude to going to work for ABN while, as Director of BEP, he was personally evaluating the SSS proposal. His involvement with the ABN office created the appearance of a conflict of interest.

Conlon's "favor" to ABN coupled with other circumstances, including evidence of deficient procurement practices in the letting of food coupon contracts to ABN, raised the question whether ABN had received preferential treatment. This question was explored by the Subcommittee, but the evidence showed that procurement practices were deficient and that any benefits ABN obtained were attributable to these deficiencies rather than preferential treatment. Nevertheless, the circumstances required inquiry. It is precisely this kind of inquiry which the Government conduct regulations seek to avert by directing employees to avoid any action which might create an appearance of giving preferential treatment or losing independence.

c. June 1977 Employment Negotiations and Contract

All of the considerations indicating that it would have been prudent for Conlon to have sought advice from his superiors after receipt of the November 1976 job offer from ABN apply with greater force to his June 1977 employment discussions with ABN. Indeed, the circumstances clearly warranted his disqualification from further involvement in the SSS matter.

Conlon admitted that, as of June 10, he had an oral agreement to go to work for ABN and, subsequently, was involved in formalizing the details until he signed a written contract on June 27. But he denied taking any action after June 10 which affected ABN's financial interest. He asserted that he absented himself from the substantive discussions at a meeting on June 21 at which ABN submitted its SSS cost proposal. He also contended that his June 24 letter to Governor Coldwell of the Federal Reserve Board recommending that the Federal Reserve advance $14 million to pay for the SSS dealt only with the method of financing a decision to purchase the SSS, a decision which he said he "completed" before June 10.

Conlon's contentions are without merit. A final decision to purchase the SSS could not have been made by Conlon prior to a review of a formal cost proposal, which was not received until June 21. This proposal quoted a price of $19.6 million on the basis of a lease-to-purchase agreement. Shortly thereafter, ABN submitted a quotation of $14 million on the basis of a direct cash purchase. In his June 24 letter to Governor Coldwell of the Federal Reserve Board, Conlon indicated that he initiated the request for this alternative price proposal because the BEP lacked the funds to enter the more expensive lease-to-purchase agreement. Conlon's letter of June 24 asked the Federal Reserve to pay for it.

Conlon's letter also endorsed without qualification the technical merits and security of the SSS even though the National Bureau of Standards ("NBS") had not responded to Conlon's request made on June 20 for a forensic analysis to identify the "treatment, level of difficulty of detection, and potential for simulation" of a currency note treated by the SSS process. BEP did not receive a response from NBS until four months after Conlon retired. The request for the NBS evaluation appears to have been the first time Conlon asked for any independent testing and analysis. Conlon did not offer a satisfactory explanation as to why he asked for the NBS evaluation after he decided to acquire the SSS.

Conlon's June 24 letter to Governor Coldwell expressly endorsed the price quoted by ABN after only two days had elapsed since receipt of the price proposal. It is unlikely that anything approaching a thorough analysis or negotiation of the cost proposal could have been made in that short period of time. In this connection the Department of Treasury was unable to find any record of a BEP study of the justification of the SSS in terms of the nature and scope of the problem of counterfeiting U.S. currency.

ABN obviously had a direct financial stake in whether the acquisition of SSS would be funded by the Government. It would mean a $14 million sale of paper treatment equipment. It would also involve the sale of sensing devices to Federal Reserve banks and the creation of a potential market for ABN's sensing devices among private businesses which deal with large volumes of cash. Weitzen proposed to use ABN Development Corporation as the focal point for the development and marketing of these devices. Conlon's action in recommending that the Federal Reserve pay for ABN's SSS was no less significant than if Conlon had directed BEP to use its funds to purchase it. Under the circumstances, his action would signify both a personal and official endorsement of the SSS and the purchase price which ABN had quoted for the system.

That Conlon's actions after June 10 constituted a conflict of interest in violation of section 208 was borne out by his conviction on July 28, 1980, of violating that provision.

2. *Richard Sennett failed to adhere to the high standards expected of Government officials by engaging in conduct which created an appearance of a conflict of interest and which in some respects, constituted serious actual improprieties.*

Sennett acknowledged that on or about June 10, 1977, he was first approached by Conlon with respect to his interest in possible employment with ABN. Sennett indicated his interest and Conlon so advised Weitzen of ABN. Sometime in the period from June 15 to 17, Weitzen met with Sennett to discuss prospective employment. Sennett told Weitzen he would entertain a written offer. ABN submitted to Sennett a written offer dated June 22, which Sennett said he received on June 24. Sennett submitted a written counter offer to ABN on June 27 which was signed by ABN on that date. Sennett signed the contract on June 28. He resigned from BEP on July 31 and began employment with ABN on August 1.

On June 21 and 22, Sennett had meetings with ABN's president, Salvatore D'Amato, concerning a contract controversy regarding Magna presses which BEP had with ABN. Sennett did not have nor did he seek the written permission of his superiors to engage in those discussions. Given the fact that Sennett had already had two discussions concerning prospective employment with ABN, his participation in these meetings created an appearance of a conflict of interest was clearly improper. In the Subcommittee's view, Sennett should have disqualified himself from the June 21–22 meetings to avoid any appearance of a conflict of inteerst or impropriety.

Sennett said in his testimony that he did tell his superiors of the existence of the offer of employment received on June 24 [3] and, thereafter, he did not participate in matters affecting ABN. Subsequent to the Subcommittee's hearings, Sennett entered a plea of *nolo contendere* to an information charging him with violating 18 U.S.C. § 208. The information charged Sennett with making a recommendation on July 28 (only 3 days before he started work with ABN) that the Magna presses not be returned to ABN. Sennett was sentenced to 1 year's unsupervised probation and a $500 fine.

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[3] He also said he apprised his superiors of the contract a few days after it was signed.

3. *The Criminal Conflict of Interest Provision of 18 U.S.C. § 208 provides an important deterrent against participation by a Government employee in a matter which affects the financial interest of a firm with which he is negotiating for employment. The Subcommittee reserves judgment on the possible need for any amendment to this section pending the outcome of Conlon's appeal of his conviction. However, the ethical regulations of the Department of Treasury and the Government generally need improvement.*

The Government interests which 18 U.S.C. § 208 seeks to protect are vital. They require the imposition of a criminal sanction on Government employees who violate their positions of trust and confidence by participating personally and substantially in any matter in which a firm with whom he is negotiating, or has an employment arrangement, has a financial interest. Section 208 presently provides a fine of up to $10,000 and/or imprisonment of up to 2 years. The proposed criminal code reform would reduce the maximum jail term to 1 year, thus classifying it as a misdemeanor, rather than a felony.[3] The Subcommittee requests that the Department of Justice reconsider its position on the appropriateness of reducing the maximum jail term in light of the conduct involved in this case and the relatively light sentences and fines imposed on Conlon and Sennett as a result of that conduct. The Subcommittee also requests that the Department reassess the evidence of actual impediments to convictions under section 208 created by a 2-year maximum prison sentence. In this connection, the Department should discuss the impact of applicable rules governing what juries may be told about the maximum penalties which may be imposed on a defendant if found guilty. The Department is requested to submit a written report to the Subcommittee in response to the foregoing matters within 30 days.

James Conlon challenged the sufficiency of an indictment charging him with violating 18 U.S.C. § 208, asserting that the Government had not properly alleged the existence of "negotiations" or "arrangement" for employment. The U.S. District Court for the District of Columbia granted Conlon's motion to dismiss the Section 208 count. The Court held that to avoid unconstitutional vagueness, the terms "negotiating" and "arrangement" must be read as requiring substantial bilateral contracts, and that an indictment must allege with particularity the details of the negotiations and arrangement.

The District Court was reversed on appeal. The U.S. Circuit held that these terms are "common words of universal usage" and that it is not necessary to require pleading of specific acts of negotiating on specific bilateral arrangements to save Section 208 (a) from vagueness. The Appeals Court also found that the indictment adequately plead a violation of Section 208.

This appears to be the first litigated case involving an interpretation of the scope of Section 208, and how a violation of it must be alleged in an indictment. The decision of the Court of Appeals appears to resolve satisfactorily the issues concerning the scope of Section 208. However, the Subcommittee reserves judgment as to whether this section should be amended pending the outcome of Conlon's appeal of his conviction.

As noted above, the conduct regulations of the Department of Treasury and of the Federal Government generally supplement the criminal provisions of 18 U.S.C. § 208 by spelling out ethical standards. The standards require the Government employee to avoid criminal conduct and to avoid conduct which might result in an appearance of impropriety which would affect adversely the confidence of the public in the integrity of the Government.

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[3] S. 1722, 96th Congress, 1st Sess. (p. 360); reported January 17, 1980 (Sen. Report No. 96–553).

These ethical standards are not esoteric, but are mere formulations of the dictates of common sense. Conlon and Sennett had a combined total of over 45 years of Government service. It is dismaying that they could have displayed an astounding lack of sensitivity to these standards.

The fact that Conlon and Sennett could engage in such conduct undetected by responsible officials in the Department of the Treasury is also a matter of grave concern. During the time period in question, the Department had no procedure to monitor potential conflicts of interest and impropriety that may be occasioned when Department employees have contacts concerning possible employment with firms having a financial interest in matters before the Department. The Conlon and Sennett cases indicate that reporting and independent assessment of employment discussions is a prudent procedure to follow in order to insulate the Government and its employees from potential allegations that might arise at a later date.

A recent GAO report found that other Government agencies are deficient in monitoring post-employment negotiations of their employees.[4] The GAO found the need for establishing clear and consistent Government-wide standards. The Subcommittee concurs.

Since the Subcommittee's hearings, the General Counsel of the Department of Treasury issued an opinion interpreting the Department's conduct regulations to require employees to report most offers of employment. It provides a useful start, but could go further by requiring employees to report offers which are rejected and specifying the nature of contacts that would constitute "offers."

The General Counsel's opinion is also limited. It addresses only employment contacts which are initiated by prospective employers. Procedures and policies concerning employee-initiated contacts should be considered in a different light.

Neither the Treasury Department's regulations nor the opinion of the General Counsel specify what action might be taken against an employee who fails to comply with the reporting procedures set forth in the opinion, and leaves the Government before the violation is detected. An employee who violates the reporting procedures will not necessarily have engaged in conduct warranting prosecution under 18 U.S.C. § 208. However, there are limits to which the Government may effectively apply a post-employment administrative remedy other than barring or suspending the employee from appearing before the agency.

B. Recommendations

1. *Prevention of Conflicts of Interest in Employment Negotiations*

The Treasury Department and the Government in general have the authority to interpret ethical regulations designed to prevent conflicts of interest and appearances of conflict of interest. The opinion of the Treasury Department's General Counsel establishes standards and procedures which would address most of the deficiencies found in its conduct regulations. The opinion requires an employee who receives an offer which he is not prepared to promptly reject to disqualify himself and notify his superiors. If he does not believe disqualification is necessary, the employee must report the offer to his superior or ethics counsellor for an independent assessment. The employee must also immediately report acceptance of an offer of employment. The Subcommittee endorses these procedures. The Subcommittee's recommendations discussed below propose further improvements in the Treasury Department's conduct regulations, as well as those of the Government generally.

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[4] Federal Agency Standards of Employee Conduct Need Improvement, October 18, 1979.

(a) The Department of Treasury should amend the opinion of its General Counsel interpreting the Department's conduct regulations to impose a specific requirement that an employee report offers of employment from a firm which has a financial interest in a matter in which the employee is personally participating or is within the employee's official responsibility, even if the offer is immediately rejected by the employee. The definition of "offer" should be broadly construed to include an indication of interest in discussing prospective employment. This procedure would permit the person receiving the report to make an independent assessment of whether there would be any conflict of interest or appearance of impropriety by the employee's continued or future involvement in the matter. This procedure would also make a record of the offer to the employee and his consultation with an independent agency official and thereby insulate the employee from potential future allegations of impropriety. In this connection, the Treasury Department should amend the opinion to specifically require that a written record be made of notices of disqualification and the Department's actions concerning reports of job offers, negotiations and arrangements.

(b) The Department should expand the foregoing opinion to specify appropriate standards and procedures for employees to follow prior to initiating any employment contacts with a firm which is interested in a matter in which the employee is personally involved. The Subcommittee believes that it is inappropriate for an employee to initiate employment contacts with such a firm unless the employee first disqualifies himself from further participation in the matter.

(c) The Department should codify in its conduct regulations the standards and procedures applicable to contacts by its employees with respect to post-government employment. Codification will assure that official notification to all employees and accord the standards and procedures the formal status as regulations. The Department should teach its employees their responsibilities. This could be accomplished by periodically circulating copies of the regulations to employees. This effort could be supplemented by advising employees of significant interpretations of the regulations made by its ethics counsellors.

(d) The Department should examine the efficacy of existing disciplinary measures that may be taken against employees who violate its conduct regulations, but leave the employ of the Department. Evidence of possible violations of these regulations by employees may not be discovered until after they leave the Department. The Department should consider the adequacy of its existing authority to impose a disciplinary sanction on such a former employee, such as barring or suspending him from appearing before the Department, and the advisability and necessity of legislation to authorize such a sanction or additional measures such as the imposition of civil monetary penalties.

(e) The Office of Personnel Management should take an active role in assisting the Department of Treasury and other Government agencies in developing standards and procedures designed to avoid conflicts of interest and appearances of conflicts of interest. The Subcommittee endorses the findings and recommendations regarding negotiations for employment contained in the GAO's October 18, 1979 report titled, "Federal Agency Standards of Employees Conduct Need Improvement." The GAO found significant variations among agencies' regulations and deficiencies in some regulations similar to those which existed in the Department of Treasury's rules. The GAO recommended that Government-wide regulations address specific policies describing limitations and restrictions on employment negotiations and procedures to be followed when negotiating for employment. (The GAO report is discussed above at pp. 44 and 45.)

OPM has the responsibility for supervising the new Office of Government Ethics created by the Government Ethics Act, and is charged with assisting the formulation of rules and regulations pertaining to conflicts of interest and ethics in the executive branch (Section 402(a) of the Act). In carrying out its responsibilities under the Act and implementing GAO's recommendations, OPM should carefully consider the record of this case. It is further recommended that OPM model Government-wide rules and procedures on the recommendations made by the Subcommittee concerning the Department of Treasury's conduct regulations.

(f) The Department of the Treasury and OPM are requested to report within 60 days to the Subcommittee on what action it will take in response to the Subcommittee's recommendations.

IX. FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS WITH RESPECT TO THE MANAGEMENT AND OPERATIONS OF BEP

1. Findings and Conclusions

The Subcommittee found significant deficiencies in BEP's procurement practices and a wide range of other problems which appear to be adversely affecting Bureau's efficiency, including outmoded financial and accounting systems, labor shortages, equipment malfunctions, and significant increases in the costs of currency and postage. Another major management deficiency was the lack of any significant supervision of the operations of BEP by the Treasury Department.

The Department of Treasury has acknowledged these problems and has taken a number of constructive steps to assure that the contracting process accords with Federal Procurement Regulations and good procurement practice. The Department has undertaken a number of management studies to identify and address many operational problems. A key factor to improvement in conditions at BEP is the assertion of control and direction by main Treasury. The Subcommittee is encouraged that Department officials have established this principle.

2. Recommendations

The Subcommittee recommends that the Department of Treasury continue to take the lead in identifying and remedying problems in BEP's operations.

The Department of Agriculture has taken over full responsibility for procurement of food coupons beginning with fiscal year 1980. The Subcommittee recommends that the Agriculture Department carefully examine its contract procedures in light of the record of this case to assure that its food coupon program comports with Federal Procurement Regulations and good contract management practice. To this end, the Treasury Department should assist the Agriculture Department by affording it the benefit of its experience and judgment, in such matters as to the adequacy of price competition among private firms which are qualified to produce and distribute food coupons.

It is further recommended that the Department of Treasury report to the Subcommittee within 120 days the status and results of actions taken by the Department to remedy the problems that have been identified in BEP's operations.

X. APPENDIXES

APPENDIX B–1

DEPARTMENT OF THE TREASURY,
OFFICE OF THE GENERAL COUNSEL,
Washington, D.C., December 19, 1979.

Hon. SAM NUNN,
Chairman, Senate Permanent Subcommittee on Investigations, U.S. Senate, Washington, D.C.

DEAR SENATOR NUNN: We have been contacted recently by the staff of the Permanent Subcommittee on Investigations, who are in the process of completing the record of your May 1, 2, and 3, 1979, oversight hearings involving Treasury's Bureau of Engraving and Printing.

At your staff's request, we are happy to provide the enclosed July 16, 1979, opinion of the General Counsel of the Treasury Department addressing an issue that you raised during the Subcommittee hearings—a requirement that Treasury employees report offers of employment received from persons or firms engaged in business with the Department. We hope that you will agree that this opinion establishes beneficial rules covering the areas that concerned you in May.

We are also currently engaged in the wider review of the Treasury Department Standards of Conduct of which you were informed at the hearings. Since the hearings, specific draft proposals have been prepared and circulated within the Department for comment. Because the study group is still working on those materials, however, we do not yet have final results to report.

Your staff's requests for information are being made on an ad hoc basis, as the particular items are identified. We are now working to compile additional materials, which we will be forwarding to the Subcommittee as promptly as possible. Some materials, as we have discussed with the Subcommittee, may be provided on a confidential basis because of law enforcement concerns in the area of counterfeiting.

If there is anything else that your Subcommittee requires, please feel free to call on us.

Sincerely,

JORDAN LUKE,
Assistant General Counsel
(Enforcement and Operation).

Enclosure.

THE GENERAL COUNSEL OF THE TREASURY

Memorandum to: All senior officials and heads of bureaus.
From: Robert H. Mundheim.
Subject: Conflicts of interest and prospective employment.

On November 27, 1978, I circulated a memorandum of general guidance to all senior Treasury officials on the subject of Conflicts of Interest and Prospective Employment. As a result of our experience with that memorandum, and the general heightened interest in such matters this past year, I am reissuing that memorandum with a few changes and an additional section establishing reporting requirements. I ask that each of you circulate this memorandum, which interprets provisions of Treasury's Standards of Conduct that apply to all Department employees, among your respective staffs to ensure that all employees know of the Department's requirements.

I. REQUIREMENT OF DISQUALIFICATION FROM PARTICIPATION IN OFFICIAL MATTERS

Title 18 § 208(a) states, *inter alia*:

> (a) . . . whoever, being an officer or employee of the executive branch . . . including a special Government employee, participates personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other preceeding (sic), application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which, to his knowledge . . . any person or organization with whom he is negotiating or has any arrangement concerning prospective employment has a financial interest—
>
> Shall be fined not more than $10,000, or imprisoned not more than two years, or both.

This language does not forbid an employee from seeking other employment while he or she is still with the Government. It does require the employee to disqualify himself or herself from participation in any Government action which may directly or predictably affect the prospective employer. The Office of Legal Counsel of the Department of Justice has expressed the view that the phrase "arrangement concerning prospective employment" may include an informal or tacit understanding that the employee will join or return to a particular firm or other organization after his Government service. Although the term "negotiating" connotes discussions and active interest on both sides, OLC has taken the position that it is "at least arguable, however, that the prohibition in 18 U.S.C. § 208(a) was intended to have a broader reach, encompassing some situations in which the Federal employee or the prospective employer has made a unilateral expression of interest."

The Treasury Department's Standards of Conduct also address this issue, albeit in more general terms. Section 0.735–30, established in conformity with Executive Order 11222, prohibits among other things, using public office for private gain, giving preferential treatment to any person, losing complete independence or impartiality, and affecting adversely the confidence of the public in the integrity of the Government.

Consequently, if an employee receives an offer of employment which he or she is not, at that point, prepared to reject, or is engaged in active negotiations with a prospective employer, that employee should promptly act to insulate himself or herself from any further official action with respect to the offering organization by asking his or her supervisor and subordinates that no further matters pertaining to that organization be referred to him or her.

The type of matter in which the employee must refrain from participating includes both particular matters (*e.g.*, negotiation of cases or contracts) and general matters (*e.g.*, the review of a regulation affecting national banks), if such matters have a direct and substantial effect on a prospective employer. Because of the difficulties associated with drawing this line in connection with general matters, the second part of this memorandum sets forth specific procedures for submitting questions to either the employee's supervisor or a Deputy Ethics Counselor for determination. The personal participation prohibited includes not just formal approval or disapproval of the particular matter but also recommendations or investigations regarding it.

In addition, it may be unseemly and inappropriate for a senior official to discuss employment with certain firms even if he or she is prepared to disqualify himself or herself in matters affecting them. For example, a senior official entering into employment negotiations with a firm involved in an important and controversial public issue with the Department can create the appearance of impropriety or undue influence that Executive Order 11222 and Section 0.735-30 of the Treasury Standards of Conduct prohibit.

II. REQUIREMENT OF REPORTS OF CERTAIN OFFERS OF EMPLOYMENT

While it is obviously important that employees disqualify themselves under the circumstances just described, it is also important that they report the receipt of some offers of employment that, in the opinion of the affected employees, do not compel disqualification. It is important that the Department receive such notice so that it may act to protect the integrity of its decisionmaking processes by making an independent judgment on the disqualification issue. Notice is similarly important so that supervisors may establish or alter personnel assignment patterns to minimize potential disruption of their missions. Finally, the giving of notice aids in protecting employees from later allegations of impropriety.

I do not believe, however, that it is necessary now to establish a requirement that all offers of employment be reported, particularly in view of the possibility that some employees might be concerned about impairment, whether real or imagined, of their futures in the Department. Consequently, pursuant to my authority as Treasury's

Ethics Counselor, I am establishing the following as implied requirements of Section 0.735-30 of Treasury Standards of Conduct:

(1) If an offer of employment is rejected immediately, or within three working days, and the employee has not participated in any activity of possible interest to the potential employer during that period, there is no automatic requirement that the offer be reported. This does not, of course, imply that a prompt rejection of an offer eliminates each employee's obligation to avoid both actual and apparent conflicts of interest.

(2) In every case, if an offer of employment is accepted, whether unconditionally or otherwise, conscientious adherence to Section 0.735-30 of our Standards of Conduct and Executive Order 11222 requires immediate disclosure of the fact of acceptance and the identity of the future employer to the employee's supervisor. This requirement will serve the needs of the Department for notice while minimizing any effect of an employee who has not yet decided whether to leave the Department.

(3) Where an offer of employment has been made, or active negotiations have begun, and the employee has deferred a decision, a more flexible line that takes into account the nature of the employee's responsibilities is needed. If any matter in which the potential employer appears to have an interest is, or has been, assigned to the employee who received the offer, or who is actively negotiating, that employee must give prompt notice.

However, where an offer has not yet been acted upon, or where active negotiations are underway, I recognize that an employee may be reluctant to disclose the existence of that situation to his or her supervisor for fear of jeopardizing his or her future employment possibilities with the Department. Consequently, each employee may choose to notify his or her Deputy Ethics Counselor and obtain the Counselor's advice on whether, under the circumstances, he or she must report the offer to his or her supervisor. Within each Bureau, the Department's Standards of Conduct designate the Chief Counsel or Legal Counsel as the Deputy Ethics Counselor. Within the Office of the Secretary, I am designating the Deputy General Counsel as Deputy Ethics Counselor. For the Legal Division, I am designating the Counselor to the General Counsel as Deputy Ethics Counselor. In order to ensure that the advice of these officials is of greatest usefulness to Department employees, I am hereby instructing each Deputy Ethics Counselor to withhold from the employee's supervisor any information obtained through such counseling in any instance in which the Counselor advises an employee that he or she need not report the existence of a pending offer of employment.

(4) In any case in which an employee has reported an offer of employment in accordance with this opinion, that employee should not participate in the related matter, whether general or particular, until the employee's supervisor or Deputy Ethics Counselor has made a determination whether the employee's interests or those of his or her potential employer are such as to make disqualification either necessary or prudent under the circumstances.

APPENDIX B-2

DEPARTMENT OF THE TREASURY,
OFFICE OF THE GENERAL COUNSEL,
Washington, D.C., January 31, 1980.

MR. PETER SULLIVAN,
Senate Permanent Subcommittee on Investigations,
Russell Senate Office Building, Washington, D.C.

DEAR PETER: This letter is in response to your inquiries of mid-December regarding certain provisions of the Ethics in Government Act of 1978. Specifically, you have asked us to respond to the following questions:

1. Which Executive Order implements § 207(a) of the Act?

2. Are officers and employees of the Treasury who are covered by § 202(a)(7)(A) public disclosure requirements also required to comply with Treasury confidential disclosure regulations?

3. What types of negotiations does Treasury interpret § 202(a)(7)(A) to cover?

4. With regard to § 207(a) confidential reports, who is required to comply?

5. Who is required to comply with the confidential disclosure interpretations in the General Counsel's memorandum of July 16, 1979?

1. *Which Executive Order implements § 207(a) of the Act?*

The Office of Government Ethics has confirmed that § 207(a) is implemented by E.O. 11222, May 8, 1965, 30 F.R. 6469, as amended by E.O. 11590, April 23, 1971, 36 F.R. 7831.

2. *Are officers and employees of the Treasury who are covered by § 202(a)(7)(A) public disclosure requirements also required to comply with Treasury confidential disclosure regulations?*

The Treasury Department interprets § 207(c) to exempt Treasury officers and employees who file public reports from also submitting confidential ones. This does not preclude collecting nonduplicative information needed for enforcement of specific statutes and regulations not having Government-wide application.

3. *What types of negotiations does Treasury interpret § 202(a)(7)(A) to cover?*

Please refer to the General Counsel's memorandum of July 16, 1979, which was sent to the Subcommittee on December 19, 1979. In addition, Treasury interprets § 202(a)(7)(A) to include all future employment arrangements arrived at prior to, or during, government service except in the obvious instance of an individual who seeks new employment subsequent to a decision to leave government service within the immediate future.

4. *With regard to § 207(a) confidential reports, who is required to comply?*

Those Treasury employees and officers described in 31 CFR Part O, Appendix A are required to submit confidential statements.

5. *Who is required to comply with the confidential disclosure interpretations in the General Counsel's memorandum of July 6, 1979?*

The General Counsel's memorandum interprets in what instances disclosure is appropriate. Treasury regulations, 31 CFR Part O, and the General Counsel's memorandum apply to any employee whose work places him within the ambit of 18 U.S.C. § 208(a).

We hope that these responses are satisfactory. Should you require any additional information, please do not hesitate to contact this office.

Sincerely,

JORDAN LUKE,
Assistant General Counsel (Enforcement and Operations).

DEPARTMENT OF THE TREASURY,
OFFICE OF THE GENERAL COUNSEL,
Washington, D.C., January 31, 1980.

Hon. SAM NUNN,
Chairman, Senate Permanent Subcommittee on Investigations, U.S. Senate, Washington, D.C.

DEAR SENATOR NUNN: On December 7 the staff of the Permanent Subcommittee on Investigations contacted us with additional requests for information to help complete the record on the Bureau of Engraving and Printing oversight hearings on May 1–3, 1979.

We are pleased to forward the attached documents in response to these requests.

(1) A legal review of the employee suggestion of James E. McGarrity. The original requests for an opinion, made in early 1979, was delayed because of the departure of Mr. Rosenbaum's predecessor in office.

(2) A memorandum outlining the current BEP approach to negotiated-versus-advertised contracts and the remedial steps taken by BEP as to its general management.

(3) A BEP Zero Based Budget Objective program outline to establish procurement procedures according to sound management principles and federal regulations.

Subsequent requests for information will be handled as soon as the requested material can be accumulated. Should you require anything else we will be happy to be of service.

Sincerely,

JORDAN LUKE,
Assistant General Counsel
(Enforcement and Operations).

DECEMBER 6, 1979.

Memorandum to: Jordan Luke, Assistant General Counsel (Enforcement and Operations).

From: David H. Rosenbaum, Acting Chief, GAA/Administration and General Law Section.

Subject: Bureau of Engraving and Printing Employee Suggestion No. EP-77-134.

This responds to your request of October 28, 1979, for review of the above referenced employee suggestion. The employee, James E. Mc-

Garrity, has suggested that the Bureau "apply Renegotiation and Excess profits legislation to all past contracts with the American Bank Note Company", in an attempt to recoup any excess profits that may have been realized by American Bank Note (ABN) in the contracts for food coupons. By memorandum of May 9, 1978, the Bureau's Legal Counsel determined that the Renegotiation Act, providing for the recovery of excess profits, did not apply to the subject contracts;[1] however, the Office of Audit for E&P suggested the applicability of 41 CFR 1-3.807-5, Defective Cost or Pricing Data, to these contracts be determined. In accordance with that suggestion, you have asked this Office to examine the applicability of these provisions to contract No. TEP-75-206.[2]

CONCLUSION

It is the opinion of this Office that recovery of any excess profits by invoking the Defective Cost or Pricing Data clause would not be proper with respect to Contract No. TEP-75-206.[3]

DISCUSSION

TEP-75-206, awarded to ABN on July 24, 1975, was a negotiated contract. The Defective Cost or Pricing Data clause[4] was included in the contract terms; and ABN did submit the required cost or pricing data.

The Comptroller General in a letter to the Honorable Sam Nunn, Chairman, Permanent (Senate) Subcommittee on Investigations (Hearings Before the Permanent Subcommittee on Investigations, 96th Congress, 1st Session, May 1, 2, and 3, 1979, p. 39) stated that:

> In order to determine whether a price adjustment is appropriate on contract 75-206, BEP must, within three years of final contract payment, perform a post-award audit. BEP must demonstrate that (a) cost or pricing data was submitted by the offeror; (b) such data was certified to be accurate, cur-

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[1] This Office concurs with the Bureau of Legal Counsel in her determination that the Renegotiation Act, which expired on September 30, 1976, is not applicable to any of the contracts with ABN. The Renegotiation Act, 50 App. U.S.C. 1211 *et seq.*, applied only to contracts for the procurement of property, processes, and services for the national defense.

[2] The Defective Cost or Pricing Data clause applies only to negotiated contracts. See, 41 CFR 1-3.807-3(a)(1). It is our understanding that all ABN Food Coupon contracts awarded since September 23, 1976 (TEP-77-1 (TN)) were formally advertised. TEP-77-1(TN) was negotiated and cost or pricing data was submitted in response to the solicitation. The contracting officer, however, determined that adequate competition existed; therefore, the data was not used. See 41 CFR 1-3.807-3(b)(1)(i). Additionally, under 41 CFR 1-3.814-2, contractors are required to maintain contract records for a period of three years from the date of final payment under the contract. Given this requirement, although the exact date of final payment under TEP-75-206 is not known, it is reasonable to assume that TEP-75-206 would be the only contract in which the clause may be invoked inasmuch as all other negotiated contracts were awarded prior to FY 1975; it would be unlikely that the final payments under these other negotiated contracts were made within the three year time limit. Notwithstanding this assumption, you should query BEP on this point.

[3] Based on the information made available to us, this Office is not aware of any other productive lines of inquiry with respect to a possible recovery from the American Bank Note Company; but, if new facts should become evident, e.g., a showing of fraud or that a BEP officer violated the conflict of interest statutes (see, 18 U.S.C. 218), this Office would be pleased to review the matter further.

[4] Although a copy of the Defective Cost or Pricing Data clause included in contract TEP-75-206 was not provided this Office, the clause provided for in 41 CFR 1-3.814-1 is attached hereto.

> rent, and complete; (c) the contracting officer relied on such data in awarding the contract; and (d) such data was defective, that is, inaccurate, not current, or incomplete at the time of submission. When the four above conditions are met, the Government may attempt to obtain a price adjustment.

This statement reflects the provisions contained in 41 CFR § 1–3.807–5. Defective Cost or Pricing Data.

With respect to elements (a) and (b), ABN did submit the required data, and it was certified to be accurate, current, and complete. There is, however, no evidence to support element (c), that the contracting officer relied on the data in awarding the contract. In fact, the Contracting Officer, J. C. Rieder, stated in a memorandum dated September 18, 1979, to Audrey Williams, Employee Relations Branch (copy attached);

> From a review of these negotiated contracts, it is the contracting officer's opinion that in each case award was made on a total price basis, and as such the Government placed little or no reliance on certified cost or pricing data.

It is readily apparent from the above statement that the contracting officer did not rely on ABN's certified cost or pricing data; this conclusion is further supported by a memorandum dated March 15, 1979, from Thomas P. O'Malley, Assistant Director, Procurement, to Leon G. Wigrizer, Inspector General (copy attached). Mr. O'Malley states:

> The ABN contract was awarded June 24, 1975. We note that the signed certificate of current cost or pricing data contained in the file cited the original solicitation number (75–184 (FA)), which was cancelled and not the solicitation (75–199(n)), under which the contract award was made. Also, we noted that *the cost and pricing data sheets, Form 59, were signed in July, i.e., after contract award.* (Italic supplied.)

On the basis of the above information, it is our firm judgment that the contracting officer did not rely on ABN's certified cost or pricing data in awarding the contract. In the absence of reliance on the data submitted by ABN, it is the opinion of this Office that price adjustment under the Defective Cost or Pricing Data clause would not be proper.

Memorandum to: Mr. Leon G. Wigrizer, Inspector General
From: Thomas P. O'Malley, Assistant Director, OAP (Procurement and Personal Property Management)
Subject: Review of Bureau of Engraving and Printing Contracts Tep–75–206(TN) and 77–1(TN) with American Bank Note Company.

This is in further reference to our conversations regarding the subject contracts and is in reply to your memorandum of February 6, 1979 in which you asked that I review the above contract files. On February 6, I provided comments to you pertaining to a legal memorandum which contained observations of potential bases for Government claims for defective pricing. On the understanding that the contracts had been competitively awarded, my memorandum indicated that certain contract provisions cited in the legal memorandum might be inapplicable or self deleting.

On March 6, I visited the Bureau of Engraving & Printing office assigned to the IRS Inspection team assisting your office, and reviewed the contracts. My observations, as they pertain to the specific questions of cost and pricing matters as well as to other matters of concern are as follows:

CONTRACT NO. TEP-75-206(TN)

1. We note from the file that, apparently, a formally-advertised invitation for bids (solicitation 75–184 FA) had been issued for seven line items of food coupon assemblies. After bid opening, but before contract award, it was decided that BEP would produce one variation of the assemblies in-house. Instead of awarding the balance of the items, as bid by the competitors responding to this solicitation, the BEP cancelled solicitation 75–184 for reasons not specified in the file, and negotiated with each of the two respondents (American Bank Note and U.S. Banknote Co.). The negotiation authority cited in the Determination and Findings is FPR 1–3.210(4), while that cited in the resultant contract is FPR 1–3.210(1). A new solicitation number was assigned (75–199(N)) to the negotiated transaction.

2. The resultant contract contains a clause package entitled "Supplement Provisions for Firm Fixed Price Negotiated Contracts Not Based on Adequate Price Competition." The BEP split the quantity of one line item (the $65 book assembly), awarding 25 million quantity to ABN and 591 million to USB at the same unit price as negotiated with ABN (we briefly reviewed the USB's concurrent contract Tep-75-208).

3. The ABN contract was awarded June 24, 1975. We note that the signed certificate of current cost or pricing data contained in the file cited the original solicitation number (75–184(FA)), which was cancelled and not the solicitation (75–199(N)), under which contract award was made. Also, we noted that the cost and pricing data sheets, Form 59, were signed in July i.e., after contract award. (We noted similar irregularities in USB's contract file Tep-75-208, where the contract was awarded June 30, 1975, the cost and pricing data sheets were signed July 25 and the certificate in the file we reviewed was not signed by the contractor.)

4. We were not able to locate the requisite memorandums of negotiation or determination of price reasonableness in either the ABN or USB contract files. Such memos might further clarify the transaction if they exist.

5. Also, we did not find the bid results of the originally issued and publicly opened IFB 75–184 to compare unit prices of that cancelled solicitation with those of subsequent contract awards.

In light of the observations outlined above, we believe that the Government might have a case for the Government to claim reimbursement, assuming the statute of limitation has not been exceeded. We recognize that such claim potential should be further evaluated by appropriate legal counsel. However, due to the problems associated with what appears to be untimely submission of cost and pricing data and possibly an erroneous certificate, we believe that the legal questions of cost recovery are compounded greatly.

CONTRACT TEP-77-1

1. This contract file contains a memo for record to the effect that the contracting officer could not determine at time of solicitation issuance the extent of competition and, therefore, he was requesting cost and pricing data with vendors' offers. The memo continues to advise that competition was, in fact, obtained and that each line item was awarded to the respective low bidder. Cost and pricing data sheets submitted were not used since the basis of award was price competition.

2. Contract awards resulting from this solicitation (No. TQ-213 (N)) were made to ABN for items 2 through 6 and to USB for item 1, each on a low bid basis.

Since contract Tep-77-1 award was made on a competitive basis, we do not believe there is a case for the Government to exercise a claim under defective pricing provisions.

The above comments are based solely upon our review of the contract files; we did not discuss these transactions with any BEP personnel to obtain further clarification.

Please let us know if we may be of further assistance.

DEPARTMENT OF THE TREASURY,
BUREAU OF ENGRAVING AND PRINTING,
September 18, 1979.

Memorandum to: Audrey T. Williams, Employee Relations Branch.
From: J. C. Rieder, Chief, Office of Administrative Services.
Subject: Employee Suggestion No. EP-77-134.

We have reviewed the resubmission of employee suggestion EP-77-134 and fail to find any additional information which would support the contractual action recommended by Mr. McGarrity.

Basically the same two areas remain for consideration, which are: (1) Renegotiation and Excess Profits Legislation and (2) Defective Cost or Pricing Data.

By Memorandum dated May 9, 1978 the BEP Legal Counsel indicated that the Renegotiation and Excess Profits Legislation was not applicable. This opinion was reaffirmed by Memorandum dated August 30, 1978.

To adequately address the Truth in Negotiation Act (Defective Cost or Pricing Data) we should emphasize that this provision does not apply to contracts awarded competitively where adequate price competition has been obtained. Contract TEP-77-1(TN) dated 9-23-76 and all ABN Food Coupon Contracts awarded since that date were awarded to the low bidder on the basis of price competition and therefore these contracts are mandatorily exempted from price reduction for defective cost or pricing data. What remains for consideration of application of this provision would be the negotiated procurements awarded prior to Contract TEP-77-1(TN). From a review of these negotiated contracts it is the contracting officer's opinion that in each case award was made on a total price basis, and as such the Government placed little or no reliance on certified cost or pricing data.

In summary of the above, we know of no provision to permit the Government to contractually reduce the price of the ABN contracts.

§ 1–3.814–1 Price reduction for defective cost or pricing data.

(a) Except as provided in § 1–3.807–3(b), the following clause shall be included in (1) all negotiated contracts which when entered into exceed $100,000, (2) other negotiated contracts for which, in connection with the initial pricing of the contract, (i) a certificate of cost or pricing data is required in accordance with § 1–3.807–3(c), or (ii) partial cost or pricing data is obtained in accordance with § 1–3.807–3.

PRICE REDUCTION FOR DEFECTIVE COST OR PRICING DATA

If any price, including profit or fee, negotiated in connection with this contract or any cost reimbursable under this contract was increased by any significant sums because:

(a) The Contractor furnished cost or pricing data which was not accurate, complete and current as certified in the Contractor's Certificate of Current Cost or Pricing Data;

(b) A subcontractor, pursuant to the clause of this contract entitled "Subcontractor Cost or Pricing Data" or "Subcontractor Cost or Pricing Data—Price Adjustments" or any subcontract clause therein required, furnished cost or pricing data which was not accurate, complete and current as certified in the subcontractor's Certificate of Current Cost or Pricing Data;

(c) A subcontractor or prospective subcontractor furnished cost or pricing data which was required to be accurate, complete and current and to be submitted to support a subcontract cost estimate furnished by the Contractor but which was not accurate, complete and current as of the date certified in the Contractor's Certificate of Current Cost or Pricing Data; or

(d) The Contractor or a subcontractor or prospective subcontractor furnished any data not within (a), (b) or (c) above, which was not accurate as submitted; the price or cost shall be reduced accordingly and the contract shall be modified in writing as may be necessary to reflect such reduction. However, any reduction in the contract price due to defective subcontract data of a prospective subcontractor when the subcontract was not subsequently awarded to such subcontractor, will be limited to the amount (plus applicable overhead and profit markup) by which the actual subcontract, or actual cost to the Contractor if there was no subcontract, was less than the prospective subcontract cost estimate submitted by the contractor: *Provided*, The actual subcontract price was not affected by defective cost or pricing data.

(NOTE: Since the contract is subject to reduction under this clause by reason of defective cost or pricing data submitted in connection with certain subcontracts, it is expected that the Contractor may wish to include a clause in each such subcontract requiring the subcontractor to appropriately indemnify the Contractor. It is also expected that any subcontractor subject to such indemnification will generally require substantially similar indemnification for defective cost or pricing data required to be submitted by his lower tier subcontractors.)

(b) The following clause shall be included in all contracts, both formally advertised and negotiated, which when entered into exceed $100,000, other than those described in § 1-3.814-1(a) (1) and (2). However, the clause need not be included where, in accordance with § 1-3.807-3(b), the requirement for obtaining cost of pricing data has (1) not been applied to a cost contract of the type specified therein, or (2) been waived by the head of the agency. In addition, the clause, with dollar amounts appropriately reduced, shall be included in contracts of this type which do not exceed $100,000 where any cost or pricing data is required in accordance with § 1-3.807-3 in connection with the pricing of contract modifications.

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DEPARTMENT OF THE TREASURY,
Washingon, D.C., January 30, 1980.

Memorandum to: Jordan Luke, Assistant General Counsel (E. & O.).
From: Terry Thiele.
Subject: Senate Permanent Subcommittee on Investigations inquiries into BEP procedures.

The Senate Permanent Subcommittee on Investigations staff has made a number of inquiries regarding BEP actions subsequent to the May 1979, oversight hearings. Specifically, we have been asked to report on: (1) the current BEP approach to negotiated-versus-advertised contracts; and (2) BEP general management actions taken since May 1979.

We have received the following information from BEP's Legal Counsel:

1. Use of negotiated versus advertised contracts

It is BEP policy to use the advertised method of procurement unless circumstances are such that it would be disadvantageous to the Government and within an appropriate exception for the use of a negotiated procurement.

Each proposed contract is reviewed for the proper method of award on a case-by-case basis by the Contracting Officer in all instances, and by Legal Counsel and the Treasury Procurement Office in contracts over $100,000. Federal and Treasury Procurement Regulations are followed.

For all negotiated contracts over $100,000 an audit report is prepared although this is not required by regulations. Internal audits are made regularly of the procurement procedures and of a number of specific contracts at BEP.

Since the Senate hearings in May 1979, new procedures have been instituted in the Procurement Office at BEP as a check to see that all proper reviews are made.

2. BEP general management activities

Funds Control—Effective October 1, 1979, a Fund Resource Control System was put into effect which will control the obligation of funds within BEP.

Financial Management Information System—a task force was established and has prepared a draft Request For Proposal (RFP) for requirements analysis and conceptual design of BEP's Financial Management Information System.

Legislation—A bill, S. 2063, which would authorize BEP to use recording clocks to record time and attendance of employees, was introduced in the Senate on November 30, 1979.

Termination of Food Coupon Procurement—The Department of Agriculture has taken full responsibility for procurement of food coupons beginning with FY 1980.

Objective No. EP-FY-80-3.—Improvement of Bureau Procurement Functions.

Responsible Official.—Assistant Director (Administration).

Problem Statement.—The Senate Permanent Subcommittee on Investigations, 1979, identified certain aspects of Bureau procurement practices as being in need of improvement. The Bureau's procurement function in respect to organization and position classification has historically been treated as a regional or secondary function, despite the fact that it is one of the largest procurement operations in the Department. In individual procurements totaling over $100,000, the Bureau has the largest number in the Department. In the total number of procurements, the Bureau has more than any other Bureau, with the exception of the Internal Revenue Service. Nevertheless, BEP's procurement function operates without interagency agreements for the production of materials, and purchase orders are executed without obligation of funds.

Objective.—Develop and staff a procurement function that will provide full compliance with all Federal procurement regulations.

Expected accomplishment.—All procurements for production materials will be tied to valid interagency agreements, and all purchase orders will denote an obligation of funds. Record of inventory items will be automated, reducing the inventory (costs) using the computer to trigger purchase requirements.

Program description.—Initiate various studies to determine the requirements to improve the Bureau procurement function. The Assistant Director (Administration) by June 30, 1979 identified that: (1) the Bureau operated without interagency agreements; (2) the position of the Bureau procurement function relative to other Department bureaus had greater responsibility than supposed; and (3) the deficiencies of organization and personnel classification could be corrected. Another study will be conducted by the Office of the Director of Administrative Programs. Procurement and Personal Property Management (OAP). Office of the Secretary to determine: (1) operational problems: (2) suggest methods of improvements; and (3) review organization and staffing. An outside consultant will be requested to develop requirements for a purchase order and inventory system that will be integrated with the Financial Management System. Another consultant will be asked to automate the purchase order and inventory control system.

MILESTONES

1. Complete initial Bureau assessment: Target. June 30, 1979; actual. June 30, 1979.

2. Complete Office of the Secretary (OAP/AAP) study of Bureau Procurement Function: Target, August 30, 1979; actual, August 30, 1979.

3. Initiate obligation (fund control) system for all Purchase Orders: Target, October 1, 1979; actual, October 1, 1979.

4. Reorganize Bureau Procurement Function: Target, October 30, 1979; actual, November 21, 1979.

5. Complete Interagency Agreements: June 30, 1980.

Agreement with the Social Security Administration: November 30, 1979.

Negotiated agreements are being coordinated with AFT, GPO, and the Federal Reserve Board.

A draft agreement has been sent to the Postal Service for approval.

The agreement presently in force with the Food and Nutrition Service (USDA Food Coupon Program) is being phased out.

6. Award contract for Requirements Definition of Purchase Order System and Inventory Control System: Original, December 15, 1979; revised, February 15, 1980.

GSA Form 2068, Request for ADP Services, and GSA Form E-42, ADP and Telecommunications Requirements Checklist, have been submitted to GSA for review and approval.

The Office of Computer Science, Main Treasury, has been notified of this procurement and will be provided a copy of the work statement for approval when it has been coordinated and finalized.

Remaining to be coordinated is the notification for the BEP Systems Analysis which is in process of submission to the Office of Administrative Programs for approval by the Assistant Secretary, Administration.

The work statement and functions for the RFQ are being coordinated prior to submission to the Materials Management Division for procurement action.

Publish the Procurement announcement in the Commerce Business Daily December 17, 1979.

7. Review results of Requirements Definition of Purchase Order System and Inventory Control System, March 31, 1980.

8. Award contract for Phase II, Automation of Purchase Order System and Inventory Control System, June 30, 1980.

9. Implement Purchase Order System and Inventory Control System, November 30, 1980.

Estimated resource requirements:

1. **Bureau Project Director—GS-13—6 staff months, $19,100.**
2. **Office of the Secretary (OAP/AAP), GS-14, 8 staff weeks, $13,900.**
3. **Consultant, Phase I, Requirements Definition, $10,000.**
4. **Consultant, Phase II, Automation, $100,000.**

***Constraints.*—Office of the Secretary, Personnel Management Evaluation Study (October 1978) questions the grades of procurement personnel, which severely hampers reorganization and hiring of qualified personnel.**

APPENDIX B-4

THE UNDER SECRETARY OF THE TREASURY,
Washington, D.C., April 3, 1980.

Hon. SAM NUNN,
Committee on Governmental Affairs,
U.S. Senate,
Washington, D.C.

DEAR SAM: Submitted for your information and use is a report on Bureau of Engraving and Printing programs to modernize management practices and enhance productivity. A copy of this report was prepared for Senator Chiles in compliance with his request contained in Senate Report No. 96-299, dated August 2, 1979.

Mr. Clements, Director of the Bureau of Engraving and Printing, and his staff will be glad to provide any additional information you may desire.

Sincerely,

BETTE B. ANDERSON.

Enclosure.

BUREAU OF ENGRAVING AND PRINTING PROGRESS TO MODERNIZE MANAGEMENT PROCESSES AND ENHANCE PRODUCTIVITY

INTRODUCTION

The Senate Appropriations Committee, during the course of its May 1979 review and hearings on the Bureau of Engraving and Printing's fiscal year 1980 budget, requested that it be advised of the Bureau of Engraving and Printing's progress to modernize its management processes, and of its efforts to enhance productivity. This report outlines the immediate steps the Bureau Director and Senior Management have taken in this regard, and discusses longer range management plans and objectives for the Bureau.

HARRY R. CLEMENTS,
Director, Bureau of Engraving and Printing.

SECTION I.—PROGRESS TO MODERNIZE THE BUREAU'S MANAGEMENT PROCESSES

Background

During the latter part of 1978 and early 1979, there were reports from Congressional investigations and Treasury Department studies which raised serious questions about management practices and procedures in the Bureau of Engraving and Printing. In summary, the questions related to:

A. Financial management;
B. Procurement practices;
C. Utilization of Automatic Data Processing technologies;

D. The efficiency of Overhead and Support organizational structures;

E. Overall management strategies for organizational growth.

A new Director was appointed in mid-1979, and immediately initiated efforts to establish both near- and long-range solutions to the weaknesses identified. The Under Secretary offered the cooperation of her staff through a series of brief, pointed studies focusing on specific problems and offering recommendations for improvement. The studies were accomplished quickly, and the recommendations capsulized, at least for administrative practices, in BEP's Zero Base Budget Objectives for Fiscal Year 1980.

A. Financial Management.—Since its creation in 1951, BEP's financial management system has been a ponderous, labor-intensive operation. Duplicate data entry is often required to a number of self-contained, but related, automated and manual financial information subsystems of varying sizes, magnitudes, and configurations. It was immediately apparent that simple automation was not the solution to improving such a system, and that some basic redesign was necessary.

The conceptual objectives of the new financial management system are: to be based on accrual accounting procedures; accommodate the specific information needs of the Bureau, such as labor distribution and accountability; incorporate the vital elements of existing financial sub-systems; integrate the management information concerns of the Office of Management and Budget, the Treasury Department, General Accounting Office as well as BEP; and rely heavily on ADP to provide timely information in support of productivity and broader management objectives. The Bureau has embarked on a four-year program to develop a Financial Management Information System (FMIS) which will meet these objectives, and a five-person Bureau Task Force was established in August 1979 to coordinate and implement the system.

A request for proposal (RFP) has been developed, a pre-solicitation conference has been held with prospective accounting systems contractors, and the solicitation will be released for bid by March 31, 1980. A contractor is expected to be at work by July 1980 for the first major phase of the FMIS—requirements analysis and conceptual design. The second major phase will incorporate the detailed design, implementation, testing and acceptance of the total system.

For the short-range, we have initiated obligation fund control procedures and automated systems in both our currency and postage stamp cost areas. These systems have improved the timeliness and utility of financial and productivity information to Bureau managers at all levels. It is our intention to incorporate the documentation and data base information developed in these systems into the FMIS to avoid unnecessary duplication of effort and, at the same time, to meet as nearly as possible current operating requirements.

The obligation accounting procedures—in reality an accounting subsystem—became necessary when the Office of Management and Budget imposed the apportionment process (Anti-Deficiency Act) on the Bureau (effective October 1, 1978). An interim obligation accounting procedure was initiated on June 1, 1979, and a formal system on October 1, 1979. Even if OMB accepts our recommendation that the requirement for the apportionment process be rescinded, since Bureau funds are derived from fluctuating sales rather than fixed appropriations, the procedures will provide a basis for a necessary internal budgeting system for BEP, heretofore lacking. In this connection, a comprehensive manual budgeting and reporting system has been adopted in conjunction with the Bureau's Resource Management System (described in Section I.E). This has resulted in significantly improved control over funds and expenditures in everyday transactions.

The Bureau also has automated its data entry system for personnel and payroll. The process consisted of securing a miniprocessor and data terminals, and fully integrating the Bureau's systems with the Department's Personnel/Payroll Information System (TPPIS). The new data entry system provides the Bureau with more timely and correct payroll data, allows the design of solutions to several other problem areas, and automatically integrates the sub-system with other sub-systems. An immediate personnel reduction of three to five staff members has been realized, and it is expected that further savings will be achieved.

B. Procurement Practices.—The Office of the Secretary, Contracts and Procurement Office, conducted a review of the procurement practices of the Bureau. The recommendations centered around a functional reorganization and improved procurement procedures and documentation. The reorganization has been implemented as recommended, and the procedures and documentation have been accomplished. To insure the quality of the implementation, a comprehensive internal audit survey of the procurement function will be conducted in April as a six-month followup to the Office of the Secretary review.

The specific recommendations from the reviews and the Bureau's responsive actions to date are included as an attachment to this report.

C. Utilization of ADP Technologies.—A concentrated effort has been initiated to improve the automation of information processing services, and to establish a framework for managing the use of ADP in the future. A philosophy for the function has been established, and the ADP Management Committee has been revitalized. A reorganization of the ADP function has been approved raising it to a primary management (Office) level, and providing two important mid-level management positions. While it is not envisioned that the staff level will be dramatically increased, the direction of ADP development will be managed to provide the Bureau with better information systems within a software orientation, heavily accenting industrial applications. Whenever possible, BEP will avoid expenditures on hardware and main frame equipment, relying instead on more cost-effective time-sharing strategies. Financial systems are the clear first priority for ADP applications, but certain production and administrative support systems also appear to have a high pay back potential and are in simultaneous development.

D. The Efficiency of Overhead and Support Organizational Structure.—A management study conducted by the Department, April 1979, indicated that "organizational problems exist which can be eliminated through restructuring." However, a detailed review of the organization by senior management indicated that almost all BEP functions were well delineated, although some restructuring appeared warranted due to changes in management emphasis and other concerns. In this connection, the Internal Audit function has been broadened to include an Internal Affairs Unit, and an Office of Quality Assurance has been established to assure appropriate concern for quality control in both production and administrative functions. Additionally, the Office of Engineering now includes space management and industrial engineering, and—as mentioned earlier—the automatic data processing function has been elevated to the Office of Information Processing and Management Systems. The responsibility for production equipment planning, various types of cost-benefit analyses, and make or buy evaluations have been combined into a newly established Operations Analysis Staff, reporting to the Assistant Director (Research and Engineering).

Currently, BEP is structured into three basic functions: Administration (about 800 employees), Operations (about 1900 employees), and Research and Engineering (about 400 employees). Over the years, BEP has taken steps to decrease the ratio of overhead costs to production costs, and is continuing these efforts. We are initiating a productivity study of administrative areas and making a concerted effort to automate the mainly manual administrative functions to reduce cost and personnel. Efforts include (1) the automation of payroll/personnel/time and attendance data entry through TPPIS, (2) the Financial Management Information System, and (3) the Supply Inventory Control System.

While BEP's use of it has been questioned in the past, overtime is nevertheless necessary to meet expanding requirements of customers. Given the physical constraints of the facilities and the equipment of the Bureau, and the fixed labor supply in most craft categories, overtime is not only unavoidable, but many times is the most economic way to accommodate short-range variations in the demand for our products. However, overtime has been substantially reduced in administrative and support areas as a result of efforts to minimize overhead costs, and we are continuing with various craft staffing and apprenticeship programs ultimately leading to a normalized 5-day week in most production areas.

E. Management Strategies.—A highly decentralized Resource Management System has been initiated which involves managers in both vertical and horizontal relationships. Resource Managers were appointed for some 22 primary resources, such as quality assurance, time and scheduling, direct material, funds, and safety. Line managers coordinate their product programs with major resource managers, and resource managers coordinate their activities across organizational lines. An Executive Committee reviewed and approved each program and resource plan.

Program managers have their work reviewed by the Executive Committee monthly as regards to quality, time and scheduling and cost. Resource managers have their responsibilities reviewed each quarter by the Executive Committee and Office Chiefs. During the monthly and quarterly reviews, methods to improve performance may be suggested or changes to plans may be incorporated. The Resource Management System is a valuable management development tool, and the performance of program and resource managers will be directly related to a bonus system for Fiscal Year 1980.

A combined manual and automated Management Information Control System (MICS) has been developed to control the Resource Management System. The MICS integrates the physical progress presentations of the program and resource managers, and provides a partial automated control of costs (product cost and general expenditures) in relation to a plan. Further automation of MICS is currently in progress.

A completely new cadre of senior executive management is now in place, and there has been a considerable turnover in mid-level management as well. SES candidates and other management development programs are underway to assure a continuing supply of high potential candidates for senior and mid-level management positions.

Summary.—Fundamental new directions have been taken by Senior BEP executives toward more modern management of BEP. The areas addressed in this section have had and will continue to have wide-ranging positive impact on BEP performance, and—in combination with our productivity enhancement strategies discussed in Section II—will generate measurable near- and long-term benefits.

SECTION II.—EFFORTS TO ENHANCE PRODUCTIVITY

Background.—Productivity enhancement encompasses all BEP resources—labor, money, material, capital equipment, energy—and is measurable in production, support, and administrative functions alike.

From 1951 until about 1972, BEP had an enviable record of steady productivity improvement. During that period, when price indices almost trebled nationally, BEP costs registered about a 33 percent *decrease*. The labor force dropped from about 6500 in 1951 to 3500 in 1972, while overall output *increased* by 35 percent. This achievement primarily was the result of a massive capital investment plan begun in the early 1960's to convert to fewer, but higher capacity intaglio presses, and growth in product volume as well as diversity.

In 1972, however, BEP—at the direction of OMB—began contracting for the production of food coupons rather than produce them inhouse as had been done since 1961. This loss of a production base upon which the previously obscured growth in overhead could be apportioned, combined with the onset of protracted increases in the national inflation rate which severely impacted our labor, material, and equipment costs, resulted in a marked productivity decline and almost doubled costs during the 1973–1978 period. Although now somewhat stabilized, product costs remain under strong inflationary pressure which can be best neutralized through productivity improvements.

Although highly capitalized organizations such as BEP tend to be fairly well protected during short periods of inflation, when fixed capital costs are a relatively high proportion of total costs, and labor costs—which increase with inflation—are a correspondingly lower proportion, they tend to suffer during longer inflationary periods as capital equipment wears out and must be replaced at a much higher cost than the amount accumulated for replacement through depreciation. (The higher the capital intensity in this situation, the greater the need for contingency funding alternatives for capital regeneration.) Similarly, government constraints on long-term contracting remove most compensatory advantages which might be sought in continuous raw material procurement to offset multi-year inflation in those costs.

Strategy.—While BEP has at its disposal the ability to simply pass cost increases through to its customers (the best protection against inflation in any case), managerial values and a desire to minimize cost burdens on our customers when they are coping with their own inflationary pressures leads to this three-point productivity strategy for near-term cost containment, and eventual cost reduction:

Minimization of overhead labor costs through automating work measurement and management information systems, creating leaner and higher skilled organizational structures in administrative and support functions, and—where appropriate—using contractors to provide services.

An accelerated capital investment plan, using funds already accumulated, which maximizes our use of state-of-the-art production technologies, and provides an optimum level of capacity for a greater mix of security document products required by the Federal Government. To protect against long-term inflation, borrowing authority may be sought to provide an alternate, lower cost, means of financing future capital regeneration.

Maintenance of effective labor and employee relations programs to promote productivity awareness, and high morale.

Fiscal Year 1980–81 Productivity Plan

1. *Annual Productivity Goal.*—To accommodate major customer requirements at costs equal to FY 79. This equates to a 10 percent to 15 percent productivity improvement to offset the impact of inflation.

2. *Productivity Improvement Activities.*—

(*a*) Capital Investments: On December 5, 1979, OMB cleared the $32 million BEP capital investment plan which includes these items:

2 sheet-fed intaglio presses to accommodate primary growth in currency demand

2 pieces of currency overprinting and packaging equipment (COPE)

1 multicolor intaglio press for postage stamp products

1 web-fed intaglio press for currency (new technology)

2 multicolor web offset presses for postage stamps, gas rationing coupons, other products

(*b*) Organizational Improvements: A major reorganization has been implemented which impacts primarily the BEP overhead area, and will enhance the cost-effectiveness of BEP indirect functions.

(*c*) Management System Improvements:

(1) The decentralized management system, "Resource Management," described earlier has been instituted for this fiscal year to achieve the overall goal of a 10 percent to 15 percent productivity improvement. Management plans for each resource were submitted under a minimum 10 percent

cost reduction goal to the BEP Executive Committee last August, and approved in September for October 1 implementation.

(2) Legislation which would authorize BEP to use an alternate to intaglio printing for the backs of $1 bills, and thereby achieve substantial economies in production costs, has been approved and introduced in Congress. Similarly, legislation which would facilitate our automation of labor control systems by authorizing the use of time clocks has been introduced in the Senate.

3. Productivity and Work Measurement.—As discussed earlier, BEP is undertaking a substantial automation and information project designed to produce more useful productivity, and other management information. Ultimately, all BEP activities will be accurately measured and reported with high frequency.

Summary.—The combined effect of increased efficiency in the administrative support functions, revitalized capital investment and technical development programs, broadening of product diversity and volumes, and improved workforce utilization and participation will generate productivity and other management improvements which promise not only to stabilize costs, but to reduce them despite the anticipated continuance of strong inflationary pressures.

RECOMMENDATIONS AND ACTIONS TAKEN TO IMPROVE PROCUREMENT PRACTICES

As a result of a recommendation in the Management Review of the Bureau, conducted by the Office of the Secretary, and the Bureau's expressed desire for a more comprehensive study in order to revitalize its procurement function, the Bureau requested the Office of Administrative Programs from the Office of the Secretary to conduct a review of the Bureau's procurement practices in July 1979. Report No. 79–6, issued September 7, 1979, was the result of that review. Listed below are the recommendations contained in Report No. 79–6 and the Bureau's current and continuing actions to improve the conditions noted.

Also included in this attachment are the remaining procurement recommendations made in the Office of the Secretary's Management Review, and the Bureau's actions.

Recommendations in Report No. 79–6

1–1 Subject: General—Organizational Structure

Recommendation.—The dollar magnitudes of the supply and procurement activities and the complexities involved in management of both functions indicate that these operations should be separated so as to provide proper internal checks on performance and to minimize opportunities for unauthorized or otherwise administratively irregular acts. We therefore recommend that the Bureau's management officials consider reorganizing the Materials Management Division in order to separate the procurement organization from the supply management organization in order to establish a controlled check and balance system.

Action.—A management analysis study was conducted which identified the need for certain organizational and manpower changes in the

Office of Administrative Services (OAS). These changes were implemented effective March 1, 1980. Briefly, functional authorities and responsibilities of the Procurement Division, and the Supply and Property Management Division have been separated in a newly created Office of Materials Management. The reorganization will provide for more effective and efficient management of these functions.

1-2 Subject: General—Procurement of Supplies From Other Than Directed Sources

Recommendation.—That purchases be made from directed sources of supply when the required or similar items are available from such sources unless approved waiver is obtained or unless an appropriate exception exists. Procurement personnel should also be provided training in determining the correct source of supply for items to be purchased. They should not rely on sources that are listed on requisitions, which are to be considered as suggested sources only, not to be followed when there is a directed source.

Action.—Internal procedures have been reviewed and modified as necessary to permit maximum procurement from directed sources. The modifications should substantially reduce the need for open market purchases. Any instance of purchase from nondirected sources will be justified and documented in the official procurement files.

1-3 Subject: General—Excessive Quantity of Purchase/Delivery Orders

Recommendation.—That an effort be made to reduce the number of orders issued.

Action.—Additional consolidation of orders, cost codes, organizational identification and reservation of funds, consolidation of orders under blanket arrangements, and increased use of imprest funds has resulted in a substantial reduction of the number of small dollar purchases. The increased use of the imprest fund will result in the elimination of 25 percent or 2,000 purchase order transactions during FY 1980.

1-4 Subject: General—Written Orders Being Issued Under Blanket Ordering Arrangements (BOA)

Recommendation.—A revision of the Bureau's standard BOA terms and conditions is recommended to conform to the requirements cited in FPR 1-3.6. A sample set of some BOA terms and conditions is contained in Appendix A-3 for possible use. As mentioned above, the number of persons authorized to place orders against the BOA should be held to the minimum necessary to meet operational requirements. The written suborder should be eliminated and persons authorized to order under the BOA should be permitted to place orders by telephone. This procedure will provide fast response and clearly reduce the administrative expense associated with the BOA process. Proper financial accounting could be assured by having: (1) the vendor agree to bill according to "cost centers," and (2) the caller citing to the supplier the "cost center" chargeable at the time the purchase is made. Alternatively, if this is not possible, the procurement and fiscal office could agree on a simplified procedure of accounting for the costs (i.e., BOA's could be charged against a "General BOA Fund" or the procurement office could notify the fiscal office once a month of the charges made to the various cost centers).

Action.—At the time of the recommendation, all BOA's for FY 1980 had been awarded. It is our intention that FY 1981 BOA's will limit the number of persons authorized to place orders under BOA's to those necessary to meet operational requirements; most orders under the new BOA's will be placed orally without written confirmation and arrangements will be made with suppliers to include in invoices to the Bureau appropriate means of costing to Bureau records.

1–5 *Subject: General—Absence of Requisition From Order Files*

Recommendation.—That all procurement files (contracts, purchase and delivery orders) include a signed requisition for the supplies/services to be purchased.

Action: The previous absence of a stock replenishment requisition in the procurement file has been corrected by placing a copy of the funding authorization for each quarter in the purchase order file and in the stock replenishment envelope. This envelope will become a part of the permanent supply files and retained for audit or investigative review.

1–6 *Subject: General—Procurement Register Inadequacies*

Recommendation.—That the Procurement Register be maintained in a book with each page containing columns for the data needed for preparation of reports. A suggested form utilizing a regular post-binder is included in Appendix A–4 for consideration. With some modification, this form is also adaptable for use as a Contract Register.

Action.—Improved forms and formats in consonance with the recommendation have been adopted for the Contract Register and Purchase/Delivery Register.

1–7 *Subject: General—Non-compliance With Requirements for Commerce Business Daily Advertisements of Purchase Orders*

Recommendation.—That all procurements in excess of $5,000 be publicized in the Commerce Business Daily unless an appropriate exception applies and that this exception be documented in the procurement file.

Action.—This recommendation has been adopted and implemented.

1–8 *Subject: General—Improper Use of GSA Federal Strip Priority Codes*

Recommendation.—That Priority Code 15 be used for all routine requisitions and that each requisition be documented with adequate justification when a code of a higher priority than 15 is used.

Action.—Justification is being filed for all high priority Federal Strip purchase actions.

1–12 *Subject: General—Availability of Funds Is Not Cer-*

Recommendation.—That action be taken to increase the size of the fund. This increase should be sufficient for the additional use that will be made of the fund if other recommendations in this report are implemented.

Action.—The Small Purchase Imprest Fund has been increased from $3,000 to $10,000 and a further increase to $15,000 has been requested.

1-10 *Subject: General—Excessive Inventory of Stock Items*

Recommendation.—That the Bureau immediately phase out the storage of any non-critical item from the inventory and use readily available sources of supply such as GSA Self-Service Industrial Stores or commercial firms. The maintenance of 16,439 different items in the inventory is undoubtedly extremely costly to the Bureau when considering that 32,000 control and inventory cards are maintained, that thousands of orders are issued each year for replenishment and that a staff of 28 supply personnel is needed. Elimination of many items from stock will, in some cases, require some advance planning by personnel utilizing these items in order to allow for acquisition time since the items will not be available on a moment's notice. However, this should be minimal, since most common use items are readily available from GSA stores stock, GSA Self-Service Industrial Stores or from the local market.

It is further recommended that Bureau management officials consider the feasibility of having a GSA self-service store within the Bureau for expendable supplies.

Action.—Action has already been taken to eliminate a large number of the stock items carried. Further reduction of stock items will be made possible by information generated from the Automated Supply Inventory Control System which is in the initial stage of implementation in the Bureau.

1-11 *Subject: General—Limited Minority Contracting Program*

Recommendation.—That Engraving and Printing implement a positive action program to award 8(a) and direct minority procurements by taking steps to identify potential requirements that can be awarded to such firms.

Action.—The Bureau of Engraving and Printing has implemented positive action to review all contractual requirements in an effort to assist minority business enterprises. This positive action increased the minority procurements from $0 in FY 77 to $389,000 during FY 78, and, as indicated in the staff study, $235,000 had been obligated to minority firms by mid-FY 79. It should be emphasized that, while BEP expenditures during those years averaged in excess of 50 million dollars, a very large percentage of the procurements and total funds involved security and non-security paper, ink, food coupons, and equipment for which there are no known minority buisness firms in existence to bid on these requirements. We believe that the 8(a) program has been utilized to its fullest extent.

1-12 *Subject: General—Availability of Funds Is Not Certified*

Recommendation.—We recommend that the Bureau's procurement staff, with the assistance of their legal counsel, develop a method to assure that proper verification as to the availability of funds is provided in each contract and order file.

Action.—Prior to any purchase action each requisition is forwarded to the Office of Financial Management for annotation of funds availability. OFM has provided a quarterly allotment of funds for stock replenishment purchases. These funds are controlled through computer listings emanating from the automated Purchase Order System.

2-1 Subject: General—Filing of Contract Records in Different Areas

Recommendation.—That a central file be established for all contracts arranged in numerical sequence by fiscal year. It is also recommended that a contract file charge-out system be established.

Action.—Most contract records have been consolidated. Only a few extremely active records are maintained in one other area for a more efficient operation.

3-1 Subject: General—Insufficient use of Imprest Fund for Minor Procurements Under $150

Recommendation.—Use of the Imprest Fund should be expanded to ALL purchases under $150 that are suitable for such methods. One suggestion is to require the purchasing agent to document the file on such purchases as indicating the reason for not using the Imprest Fund. Treasury Form 70-06.2, "Purchase/Delivery Order Record," is suitable for this purpose. This procedure would encourage greater use of the Imprest Fund method for small purchases.

It is recognized that a significant problem may exist regarding access to the building and receiving area facilities and regarding parking space for delivery vehicles. Such problems may require the assistance of the Bureau's senior management to resolve. One possibility is to locate the Imprest Fund operation on the first floor near the receiving dock.

Action.—Each procurement under $150 is carefully reviewed to assure maximum use of the Imprest Fund. As a result, we estimate that 1,500 additional purchases under $150 will be made this year using the Imprest Fund. An investigation is being conducted in this area to determine ways to further expand this economical purchasing method.

3-2 Subject: General—Small Purchases—Unnecessary Written Quotations for Small Purchases

Recommendation.—That the use of oral instead of written quotation procedures be used for small purchases under $5,000 where feasible in accordance with FPR Subpart 1-3.6. An informal record of such quotations should be maintained; the Purchase/Delivery Order Record (Form No. TDF 70-06.2) is suitable for this purpose.

Action.—Increased emphasis in training purchase agents has been provided to assure that, wherever feasible, oral in lieu of written quotations are used for small purchases under $5,000. In addition, an informal record is maintained in the procurement file.

OS Management Review Recommendations

Listed below are the recommendations concerning the Bureau's procurement and contract administration cited in the Management Review conducted by the Office of the Secretary.

Recommendations.—

VII-2: Closer review should be made of proposed contracts before award and better controls should be instituted for contract administration after award. Bureau internal auditors should expand audit coverage to include a broader spectrum of contracts and provide the contracting officer with more in-depth analysis of proposed contracts.

Action.—We have developed a contract check-off sheet which details significant statutory as well as regulatory requirements. This check-off sheet serves as a reminder to the Contract Officer at time of award to insure proper and timely actions are taken. In addition, a new contract jacket has been developed which delineates specific areas for filing information and documentation. This standardization of the contract file has assisted tremendously in contract administration. We believe our improved contract files have added immeasurably to our contract administration efficiency.

VII–3: The BEP contracting officer should request the internal auditors to perform cost and pricing reviews of all negotiated contracts over $100,000. If the auditors cannot perform this service because of limited resources, it should be obtained from the Departmental Office of Audit or from the Defense Contract Audit Agency in accordance with Treasury Directive 70–07.

Action.—On all competitive negotiated contracts in excess of $100,000 awarded since September 1, 1977, the Office of Audit and Internal Affairs has assisted the Bureau's Contracting Officer in performing cost and price reviews.

VII–4: Contracting personnel should set up procedures to review contracts more closely, prior to award, for any provisions which may subsequently be questioned and any errors which may have been made in the preparation of the contract.

Action.—In addition to the actions described under VII–2 and VII–3 above, the manager of the newly-established Contract Division has restructured the organization and realigned contractual functional responsibilities. This will facilitate documentation and review. The provision made for additional reviews and analysis should reduce contract administration errors to a minimum.

VII–5: Accounting control over contract payments by the Office of Financial Management should be strengthened. OFM should program its accounting system to list any contract on which payments reach a certain predetermined percentage of the contract ceiling. This would serve as an instrument of internal control, allowing management to identify potential contract overruns and take any corrective action needed.

Action.—Accounting control over contract payments have been strengthened through the establishment of an effective contract monitoring system. This system includes on-site inspections, appropriate documentation, and such internal audit reviews of incurred costs and contract compliance considered necessary prior to payment.

In a further effort to eliminate potential contract overruns, the Bureau will make full use of requirements contracts.

VII–6 through 10: These recommendations concerned food coupon inventories, storage facilities, and deliveries. Since the Bureau is no longer involved in either the manufacture of food coupons or the administration of contracts for the Department of Agriculture, we are not responding to these recommendations in this report. Effective October 1, 1979, this responsibility was transferred to the Department of Agriculture.

APPENDIX E

PROHIBITION OF ON-THE-JOB CONFLICTS OF INTEREST

18 U.S.C. § 208 Acts affecting a personal financial interest

(a) Except as permitted by subsection (b) hereof, whoever, being an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or the District of Columbia, including a special Government employee, participates personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which, to his knowledge, he, his spouse, minor child, partner, organization in which he is serving as officer, director, trustee, partner or employee, or any other person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest—

Shall be fined not more than $10,000, or imprisoned not more than two years, or both.

(b) Subsection (a) hereof shall not apply (1) if the officer or employee first advises the Government official responsible for appointment to his position of the nature and circumstances of the judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter and makes a full disclosure of the financial interest and receives in advance a written determination made by such official that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from such officer or employee, or (2) if, by general rule or regulation published in the Federal Register, the financial interest has been exempted from the requirements of clause (1) hereof as being too remote or too inconsequential to affect the integrity of Government officers' or employees' services.

Appendix F

United States District Court
For the District of Columbia

United States of America v. James A. Conlon, Defendant

(Criminal No. 79-00380)

(VIOLATION OF 18 U.S.C. § 208(a) (CONFLICT OF INTEREST) AND 18 U.S.C. § 1623(a) (FALSE DECLARATION BEFORE A GRAND JURY))

Indictment

The grand jury charges that:

Count One

In the period from in or about December 1976 through June 1977 in the District of Columbia, James A. Conlon, the Defendant, being an officer and employee of the executive branch of the United States Government, that is, the Director of the United States Bureau of Engraving and Printing, unlawfully and knowingly did participate personally and substantially as such officer and employee, through decision, recommendation, and the rendering of advice, in a proposal of the American Bank Note Company for a Security Signature System for U.S. Currency, a particular matter in which to his knowledge the American Bank Note Company, a company with which he was negotiating and had an arrangement concerning prospective employment, had a financial interest.

In violation of Title 18, United States Code, Section 208(a).

Count Two

1. On or about April 6, 1979, in the District of Columbia, James A. Conlon, the Defendant, having duly taken an oath that he would testify truly before a Grand Jury of the United States, duly called, empanelled and sworn as a Grand Jury in and for the District of Columbia, unlawfully, knowingly and contrary to said oath did make false material declarations as hereinafter set forth.

2. At the aforesaid time and place the Grand Jury was conducting an investigation to determine whether there was probable cause to believe that James A. Conlon, the Defendant, had violated laws of the United States, including 18 U.S.C. §§ 207 and 208.

3. It was material to the aforesaid investigation to determine whether:

(*a*) James A. Conlon, the Defendant, as the Director of the Bureau of Engraving and Printing participated personally and substantially through decision, recommendation, the rendering of advice, or otherwise in a proposal of the American Bank Note Company for a Security Signature System for U.S. Currency;

(b) James A. Conlon, the Defendant, was negotiating with and/or had an arrangement with Edward H. Weitzen and/or American Bank Note Company concerning prospective employment in the period October 1976 through June 1977.

4. At the time and place alleged in paragraph 1 herein, James A. Conlon, the Defendant, appeared as a witness, and then and there, being under oath, unlawfully and knowingly made the following false material declarations:

Q. When did you begin to discuss with American Bank Note Company representatives employment with the company that led to your actually joining them?

A. I believe the first conversation was around June 10th of 1977. I had announced my retirement on June 2nd to Mrs. Anderson at Treasury.

* * * * * * *

Q. Is it possible then, that you discussed employment with Mr. Weitzen on or about May 31st, June 1, 1977?

A. Oh, absolutely not, because *at that time I had not made up my mind to retire. My decision to retire was a very spontaneous decision.* I'd be glad to tell you about it.

5. The aforesaid *italicized* material testimony of James A. Conlon, the Defendant, as he then and there well knew and believed, was false in that his decision to retire was not a very spontaneous decision, and before June 1, 1977, he had made up his mind to retire from the Bureau of Engraving and Printing.

In violation of Title 18, United States Code, Section 1623(a).

Count Three

1. On or about April 6, 1979, and May 16, 1979, in the District of Columbia, James A. Conlon, the Defendant, having duly taken an oath that he would testify truly before a Grand Jury of the United States, duly called, empanelled and sworn as a Grand Jury in and for the District of Columbia, unlawfully, knowingly, and contrary to said oath did make false material declarations as hereinafter set forth.

2. At the aforesaid times and place the Grand Jury was conducting an investigation to determine whether there was probable cause to believe that James A. Conlon, the Defendant, had violated laws of the United States, including 18 U.S.C. §§ 207 and 208.

3. The Grand Jury realleges and incorporates by reference paragraph 3 of Count Two of the Indictment.

4. At the times and place alleged in paragraph 1 herein, James A. Conlon, the Defendant, appeared as a witness, and then and there, being under oath, unlawfully and knowingly made the following false material declarations:

Q. Looking at the letter, are you able to identify that as a letter that you sent to Governor Coldwell?

A. Yes. I recall the contents of the letter, yes.

Q. Did you prepare the letter?

A. I believe staff prepared it. I don't believe I personally prepared it.

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[1] May be found in the files of the subcommittee.

Q. Was it prepared at your request?

A. I don't believe that would be a proper way to describe it, Mr. Carver.

Q. Did you initiate action to have the letter prepared?

A. *I do not believe so.*

* * * * * * *

Q. Now, in the final paragraph of this letter on the third page, it says "We are hopeful the Federal Reserve will be able to approve a prepayment advancement of funds to permit our early direct purchase of this essential equipment."

What essential equipment?

A. That would have been the security signature equipment.

Q. Security signature system equipment; is that correct?

A. Yes.

Q. Is it fair to say then that you were telling a governor of the Federal Reserve in your letter that this was essential equipment and that you were seeking the most cost effective method of acquisition of that equipment and recommending to him a course of action?

A. Technically, Mr. Carver, as director of the Bureau I was forwarding that letter. *It's my recollection that I did not prepare that letter.* That letter reflects the ongoing consideration of Bureau staff for the acquisition of equipment and that this represented their then current feelings of how they could best acquire the equipment.

* * * * * * *

Q. You mentioned a letter?

A. Yes, sir.

Q. To Governor Coldwell. The one you described the last time you were here?

A. Yes, sir.

Q. You said something about Mr. Schneider. How was he connected with that letter, to your own personal knowledge?

A. I am hopeful that I explained to you when we discussed it before, that that letter was originated by the Bureau staff and that I felt Mr. Schneider was the principal author—sir?

Q. Who originated it on the Bureau staff?

A. *I believe I told you before that Mr. Schneider was the principal architect.*

Q. Did Mr. Schneider write it?

A. *As far as I know, sir, yes.* In fact, I remember saying to you, Mr. Carver, that just looking at the language of the letter, it was financial language which was not my type of language, for example, and I think it was something about zero based costing, and I believe I also remember calling to your attention the use of the plural noun, "we" frequently throughout the letter, which indicated it was the staff's posture.

5. The aforesaid underscored material testimony of James A. Conlon, the Defendant, as he then and there well knew and believed, was false in that:

(*a*) James A. Conlon participated personally and substantially in the preparation of the letter of June 24, 1977, to Philip E. Coldwell: he initiated the letter and he prepared the final draft.

(*b*) When he testified before the Grand Jury on April 6, 1979 and May 16, 1979, James A. Conlon well knew that he, and not Maurice Schneider, was the principal architect of the June 24, 1977 letter.

(*c*) When he testified before the Grand Jury, James A. Conlon well knew and believed that he initiated action to have the June 24, 1977 letter prepared.

In violation of Title 18, United States Code, Section 1623(a).

Count Four

1–3. The Grand Jury realleges and incorporates by reference paragraphs 1–3 of Count Three of the Indictment.

4. At the times and place alleged in paragraph 1 herein, James A. Conlon, the Defendant, appeared as a witness, and then and there, being under oath unlawfully and knowingly made the following false material declarations:

Q. Now, there came a time, didn't there, when the security signature system, and now we're talking about a more formal proposal, was submitted from American Bank Note Company?

A. I believe that was prior to this time, because——

Q. I'm just asking whether there came a time when——

A. Oh, but in relation to this document, before it, yes.

Q. What was your involvement in the receipt of that proposal?

A. *None at all.* I remember that Mr. D'Amato came to the Bureau. The meeting was held in Mr. Berry's office. I believe the gentlemen present were Mr. Berry, Mr. Rieder, Mr. Prescott and Mr. D'Amato. I had been in Mr. Berry's office earlier when Mr. D'Amato came in, as I recall it. I sat at the round table that Mr. Berry has in his office for an opening of the meeting, if you will, and then I excused myself and left.

In fact, I recall specifically that I asked Mr. Rieder to come with me to my office because I wanted to show Mr. Rieder something that would be explanatory of what the security signature system was about.

Q. How is it that was something that you did?

A. Because I recognize—you remember earlier I had said that this information was disseminated on a need to know basis.

Q. Had Mr. Rieder been informed of this system before this meeting?

A. I had not informed Mr. Rieder. I feel that someone must have, yes, on the staff, but I was aware that Mr. Rieder——

Q. Is that from personal knowledge or is that just a guess?

A. No. As I said, I feel that, but I was aware that Mr. Rieder had not been involved in the demonstrations, et cetera. I had a small device in my office which had been built to demonstrate that a note with the secret material placed on this device would cause a light to go on. I called Mr. Rieder over and I showed him a piece of currency and pointed out to him that it looked no different than any other currency. I had him place it on the machine and saw the little light, and I was demonstrating that this is what they're talking about.

So, I remember that specific incident. He then returned to the meeting, and that was the first proposal, and I understand at this point that after that there was a letter from Mr. Rieder back to American Bank Note Company, American Bank Note Company back to him.

Q. How do you happen to understand that?

A. I have seen copies of these documents.

* * * * * * *

Q. How did you do that?

A. About the only incident that occurred that would have been a matter of concern in this connection was the proposal submitted by the American Bank Note Company to the Bureau. I believe that date was June 20 or 21. That meeting occurred, and I remember it very specifically, in Mr. Berry's office, which again, was down the hall from mine. I was in Mr. Berry's office for some other purpose that morning when Mr. D'Amato from the American Bank Note Company arrived with a proposal. Mr. Rieder, Mr. Berry, Mr. Prescott, I believe the people who were present. As a courtesy, again, I had said hello to Mr. D'Amato and, in fact, opened the meeting and *then I withdrew. I absented myself.* I remember it very specifically because in doing so, I asked Mr. J. Rieder, the Bureau's Procurement Officer, to please come back to my office with me for a moment. My reason for doing that was, again, I recall very specifically, was that Mr. Rieder had not had the opportunity to participate in any of the demonstrations on the security signature system which had been held. And I was aware, therefore, that he was not entirely cognizant of what the nature of the subject was. And I felt it would be helpful for him to have some understanding of it. So for no more than five minutes, I had Mr. Rieder in my office, which gave me the opportunity to demonstrate to him on a very small wire implement that I had in the office, what a security signature system document was, a currency note that had the system and a currency note that did not and showed him how it could be submitted to an instrument and how it would relay a signal. After that, Mr. Rieder returned and joined the other people and they continued their consultations on the American Bank Note Company proposal. It was a subsequent document exchange between the Bureau and American Bank Note Company and, again, I was not even privy to that at the time it happened.

Q. Now, sir, when you left the room, did you tell the people present that you were leaving the room because you were now accepting a job with American Bank Note Company?

A. No, sir, I didn't use that kind of language. I simply excused myself and said, "I leave this in your hands," and asked Mr. Rieder to come with me.

Q. He was the contract officer?

A. He was the contracting officer, yes.

Q. And you were aware of that when you took him out of the room with you?

A. I absolutely was, yes, sir.

Q. You also had authority as a contract officer, didn't you?

A. I had technical authority in my capacity as Director, Mr. Carver, but I never participated in any negotiations for contracts in the Bureau of Engraving and Printing.

Q. How do you define negotiations, Mr. Conlon?

A. I think in the context which it's being used. Very specifically, to sit at a negotiating table with contractors and to discuss offered prices or proposed prices and to go into all the particulars relative to the fairness of those prices, the adequacy of them, and to, in effect, to bargain for the best price for the government. And I never participated in those kind of exercises. I had confidence in the competence of the staff people who did.

5. The aforesaid underscored material testimony of James A. Conlon, the Defendant, as he then and there well knew and believed, was false in that:

> When the more formal proposal was received in the Bureau of Engraving and Printing, James A. Conlon, the Defendant, was the principal actor for the Bureau of Engraving and Printing with respect to the receipt of the proposal: he supported it, and he was an active, major participant in the proposal presentation meeting.

In violation of Title 18, United States Code, Section 1623(a).

A True Bill.

Foreman: ____________________
Date: ________________________

THOMAS H. HENDERSON, JR.,
Chief, Public Integrity Section,
Criminal Division,
Attorney for the United States.

APPENDIX H

United States District Court
For the District of Columbia

(Criminal No. 79-380)

UNITED STATES OF AMERICA

v.

JAMES A. CONLON

Memorandum

I.

This Memorandum is filed in further explanation of the Court's Order of October 15, 1979, granting the renewed motion to dismiss Count I of the indictment against defendant, the former Director of the Bureau of Engraving and Printing. That indictment charged him with violating 18 U.S.C. § 208(a) (1976 and Supp. I 1977) by participating as a government officer in a proposal by the American Bank Note Company ("ABN") while he was "negotiating and had an arrangement concerning prospective employment" with ABN.[1]

Section 208(a) of Title 18, U.S.C. is the part of the bribery and conflict of interest laws that prohibits a federal employee from participating in official actions that affect a person or organization in which the employee has a financial interest. Section 208(a) provides in relevant part:

> Except as permitted by subsection (b) hereof, whoever, being an officer or employee of the executive branch of the United States Government, [or] of any independent agency of the United States . . . participates personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a . . . contract . . . or other particular matter in which, to his knowledge . . . any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest—
>
> Shall be fined not more than $10,000 or imprisoned not more than two years, or both.[2]

---

[1] By Memorandum and Order of September 28, 1979, the Court dismissed three other counts against the defendant, which charged him with perjury before a grand jury in violation of 18 U.S.C. § 1623.

[2] Section 208 provides in full:

ACTS AFFECTING A PERSONAL FINANCIAL INTEREST

(a) Except as permitted by subsection (b) hereof, however, being an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, a Federal Reserve bank director, officer, or employee, or of the District
(Continued)

The indictment charging the defendant Conlon with violating section 208(a) alleges in its entirety that:

> In the period from in or about December 1976 through June 1977, in the District of Columbia, JAMES A. CONLON, the Defendant, being an officer and employee of the executive branch of the United States Government, that is, the Director of the United States Bureau of Engraving and Printing, unlawfully and knowingly did participate personally and substantially as such officer and employee, through decision, recommendation, and the rendering of advice, in a proposal of the American Bank Note Company for a Security Signature System for U.S. Currency, a particular matter in which to his knowledge the American Bank Note Company, a company with which he was negotiating and had an arrangement concerning prospective employment, had a financial interest.

On September 7, 1979, the defendant filed a motion to dismiss Count I, alleging that the indictment failed to state an offense and that as drafted, the indictment was so vague that it did not sufficiently apprise the defendant of the accusations against him. Simultaneously, pursuant to Rule 7(f), Fed. R. Crim. P., the defendant filed a motion for a Bill of Particulars asking, *inter alia*, that the Government:

> 6. State upon what date or dates the government contends that the defendant negotiated or was negotiating with ABN. State further where and with whom such negotiations took place and state the substance of these negotiations.
>
> 7. State upon what date or dates the defendant had an arrangement concerning prospective employment within ABN.

Motion for a Bill of Particulars, September 7, 1979, at 1.

The Government opposed the motion to dismiss on the ground that the indictment sufficiently charged an offense under the statute, and adequately informed the defendant of the nature of the accusations against him. *See* Government's Response in Opposition to Defendant's Motion to Dismiss the Indictment, September 19, 1979, at 1–5. The government opposed the request for particulars about the acts of

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(Continued)
of Columbia, including a special Government employee, participants personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which, to his knowledge, he, his spouse, minor child, partner, organization in which he is serving as officer, director, trustee, partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest—

Shall be fined not more than $10,000, or imprisoned not more than two years, or both.

(*b*) Subsection (a) hereof shall not apply (1) if the officer or employee first advises the Government official responsible for appointment to his position of the nature and circumstances of the judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter and makes full disclosure of the financial interest and receives in advance a written determination made by such official that the interest is not so subrtantial as to be deemed likely to affect the integrity of the services which the Government may expect from such officer or employee, or (2) if, by general rule or regulation published in the Federal Register, the financial interest has been exempted from the requirements of clause (1) hereof as being too remote or too inconsequential to affect the integrity of Government officers' or employees' services. In the case of class A and B directors of Federal Reserve banks, the Board of Governors of the Federal Reserve System shall be the Government official responsible for appointment.

negotiation because it "request[s] specification of what is clearly evidentiary material." It objected to giving particulars about the nature of the "arrangement" because to do so "would serve none of the objectives of a bill of particulars and would in effect compel disclosure of the Government's legal theory and evidence." Government's Response to Defendant's Motion for Bill of Particulars, September 19, 1979, at 2–3.

On September 28, 1979, after argument of the motions, the Court declined to dismiss Count I and granted, in greater part, the motion for a Bill of Particulars. In denying the motion to dismiss, the Court noted that "Defendant conceded at argument that * * * favorable action on his Motion for a Bill of Particulars would cure the defects at issue." Memorandum and Order, September 28, 1979, at 1.[3] As a result of defendant's concession, the Court did not reach his claim that the indictment failed to state an offense. By accompanying Order, the Court granted the request for particulars 6 and 7, *supra*, because "they seek to identify only the nature and time of the essential acts of alleged participation as a government officer in contract negotiation with an organization with whom the defendant was allegedly negotiating for employment." Order, September 28, 1979.

The Government responded to the Order by filing a Bill of Particulars on October 4, 1979. In response to request 6, seeking particulars of the acts of negotiation, the Government reiterated its allegation:

> that the defendant was negotiating with ABN on December 7, 1976; December 22, 1976; April 21, 1977; May 10, 1977; May 17, 1977; June 21, 1977 and June 24, 1977.

But the Bill of Particulars conceded that:

> *We do not know when, where or with whom such negotiations were begun.* The defendant has admitted discussing employment with Edward Weitzen on or about *June 10, 1977*, and *soon thereafter agreed to work for ABN.*

Bill of Particulars at 4 (italic added). In response to request 7, seeking particulars of the alleged arrangement for employment, the Government responded again:

> The Government alleges that the defendant had an arrangement for employment with ABN on December 7, 1976; December 22, 1976; April 21, 1977; May 10, 1977; May 17, 1977; June 21, 1977 and June 24, 1977.

But with respect to the arrangement, the Government conceded that:

> *We do not know where or with whom the arrangement was made nor do we know when it began, whether it was written or oral or whether a date for employment had been arranged.*

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[3] Ordinarily, the filing of a Bill of Particulars will not salvage a defective indictment. Russell v. United States, 369 U.S. 749 (1962). However, the Court treated the defendant's representations that a Bill of Particulars would "cure" any defects as a conditional offer to waive any right to contest the sufficiency of the indictment pursuant to Rule 12, Fed. R. Crim. P. Accordingly, the Court, in its September 28 Memorandum and Order, dealt only with the defendant's claim that the indictment did not sufficiently protect him against later jeopardy for the same offense. *See* Memorandum and Order, September 28, 1979, at 1. *Cf.* Hamling v. United States, 418 U.S. 87, 117 (1974), *rehearing denied,* 419 U.S. 885 (1975) (indictment serves both to apprise defendant of charge and as a bar to future jeopardy). It did not reach the defendant's claim that the indictment failed to charge an offense under section 208, which is here renewed.

> The defendant has admitted discussing employment with Edward Weitzen on or about June 10, 1977 and soon thereafter agreed to work for ABN.

Bill of Particulars, at 4 (italic added).[4]

On October 2, 1979, pursuant to the Court's pretrial direction, the Government filed its proposed jury instructions, which include instructions construing the terms "negotiating" and "arrangement." The proposed instructions would have directed the jury that:

> The term "arrangement concerning prospective employment" means a plan or agreement with respect to future employment.[5]
>
> The term "negotiating" means submitting and considering offers until an acceptable offer is made, and accepted, or until it becomes apparent that no acceptable offer will be made. The brevity or the length of this process does not remove it from "negotiating."[6]

The definition of "arrangement" is drawn from Webster's New World Dictionary (College Ed. 1968), and the definition of "negotiating" from *United States v. McShain, Inc.*, *supra*, a civil contract action involving government procurement.

Meanwhile, a discovery dispute erupted that required court intervention. The Government resisted defendant's requests under Rule 16, Fed. R. Crim. P., for his chronological files and other materials useful to refreshing his recollection about his daily activities during all of 1976 and the first six months of 1977.[7] The Government contended that the chronological files and related papers were not material within the meaning of Rule 16(a)(1)(C) and that the request should be denied as "a demand for an open-ended inspection and examination of the Government's files."[8]

At oral argument on the motion, the Government acknowledged that although the indictment specified that the alleged acts of substantial participation in the ABN proposal were confined to the period from December, 1976, to June, 1977, the "arrangement" or "negotiating" might have arisen or taken place any time during the defendant's tenure as director of the Bureau.[9] Accordingly, the failure of the indictment to specify when the alleged connection with ABN arose rendered the defendant accountable for all his actions over an 18-month period. The Court granted the defendant's discovery request on the ground, among others, that the defendant needed the materials to prepare himself to recall and account for all his activities during the 18-month period in which, according to the Government, he might have initiated an "arrangement" or a process of "negotiating."

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[4] It is important to note that the dates specified in the Bill of Particulars identify dates on which the defendant participated in the ABN proposal as a government employee, and not dates on which he was negotiating or arranging. Indeed the Government maintains that the arrangement or process of negotiating might have come into being at some unspecified time prior to December, 1976, when the defendant is first alleged to have participated substantially in the ABN proposal.

On October 10, 1979, the Government filed a motion to amend its Bill of Particulars to, *inter alia*, add an additional date to paragraphs 6 and 7 on which the defendant was allegedly negotiating or had an arrangement with ABN. First Amended Bill of Particulars, October 10, 1979, at ¶¶ 6, 7. This date—June 15, 1977—reflects an additional occasion on which the defendant allegedly advocated ABN's proposal to the government. Like the other dates, it bears no relationship to acts of arrangement or negotiating. *See id.* at ¶ 3(g).

[5] Government's Proposed Jury Instructions, October 2, 1979, at No. 10, *citing* Webster's New World Dictionary (College Ed. 1968).

[6] Government's Proposed Jury Instructions, *supra* at No. 9, *citing* United States v. McShain, 103 U.S. App. D.C. 328, 258 F.2d 422, 424, *cert. denied*, 358 U.S. 832 (1958).

[7] A list of the material requested by the defendant is attached as Exhibit 1 to Government's Memorandum in Support of the Government's Motion for an Order Directing James A. Conlon to Comply with the Provisions of Rule 16(b) (1) (A), *etc.*, Sept. 26, 1979.

[8] Government's Memorandum, *supra* note 7, at 4, 6 n. 8.

[9] Count Two of the indictment alleged that the defendant was negotiating or had an arrangement for employment with ABN in October, 1976.

On October 9, 1979, in response to what the defendant described as the "in large part, inadequate" response by the Government to the Bill of Particulars, the defendant renewed his motion to dismiss Count I on the same grounds raised in his original motion to dismiss. *See* page 2, *supra*. The defendant noted that "[t]he existence of negotiations or an arrangement must coincide with an act of substantial participation." Memorandum of Law in Support of Motion to Dismiss, October 9, 1979, at 3. Further characterizing the Government's response to the Bill of Particulars, the defendant concluded:

> All in all, the government appears, by its own admissions, to know nothing about any arrangement or negotiations. The government's response to the bill of particulars, thus, does not cure the defect present in the indictment.

Id.

In the argument on the motion to dismiss, the Government proffered and the defendant conceded that a witness would testify that in November, 1976, prior to the alleged acts of participation, the defendant told the witness that he would be joining ABN when he retired from the Bureau. Further, the Government represented that witnesses would testify that while the defendant was still director of the Bureau, he participated personally in the selection, leasing, design and furnishing of offices that he subsequently occupied as an officer of the American Bank Note Development Corporation, a wholly-owned subsidiary of ABN. The Government stated that it would produce documentary evidence and testimony that the defendant, acting for ABN, met with agents of the lessors and architects and inspected the space.[10] According to the Government, this evidence, in addition to other evidence not proffered, would demonstrate that the defendant was negotiating or had an arrangement with ABN while still the director of the Bureau and while actively involved in consideration of a proposal to the Bureau by ABN.

II

A

The absence of any authoritative definition of the terms "negotiating" and "arrangement" has prompted threshold consideration of the possibility that the statute may on its face be so vague as to violate the Constitutional guarantee of due process.[11] The Government, in apparent recognition of the difficulties posed by the terms and the Court's duty to avoid Constitutional issues by a narrowing construction, has suggested a number of interpretations which in its view would solve the vagueness problem.

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[10] The transcript of defendant's testimony before the Grand Jury also discloses that the defendant communicated with ABN personnel about the office space. *See* Testimony of James A. Conlon, April 6, 1979 at 19–29 (filed in the instant criminal action of September 7, 1979).

The indictment does not, however, charge that the defendant's effort with respect to office space for ABN was itself an "arrangement" for employment. The Government cites this proffer merely as evidence of an arrangement not otherwise specified.

For example, the Government's proposed jury instructions defined "arrangement" as a "plan or agreement with respect to future employment." This definition was not chosen or extrapolated from legislative history or from Court decisions. The Government selected it from among several common dictionary definitions which differ one from the other in critical respects. Thus, Webster's Third New International Dictionary 120 (Unabridged Ed. 1968) defines "arrangement" as both "a preliminary step or measure" and as a "mutual agreement or understanding." As a result, under one common definition, an "arrangement" would require proof of some mutual agreement about employment, whereas under the second definition, proof of any preliminary step, however tentative, could constitute an arrangement. Thus, under the second definition, circumstantial evidence of an employee's unilateral plan or mere intention to seek employment with an organization doing business with him as a government official might be sufficient to establish guilt under an indictment charging participation by the employee in a matter involving a person with whom the employee had an "arrangement."

Similarly, the Government relies for its definition of "negotiating" on *United States v. McShain, supra*, 258 F.2d at 424. "Negotiating" is interpreted as

> submitting and considering offers until an acceptable offer is made, and accepted, or until it becomes apparent that no acceptable offer will be made. The brevity or the length of this process does not remove it from "negotiating."

Government's Proposed Jury Instructions, *supra*, at No. 9.

McShain involved a civil action on a contract. The Government offers no reason why this definition should be applied to a criminal prosecution under section 208. Moreover, the excerpt upon which the Government relies for its definition follows a description of a traditional exchange of offers—precisely the sort of exchanges the proof of which, the Government contends, is not necessary or required by its concept of "negotiating." Thus, in *McShain* the Court of Appeals stated (in a sentence preceding that excerpted by the Government):

> We see, in the above-described documents, introduced by the Government, a text-book example of a contract. There was an invitation to the defendant to make an offer, an offer, and its acceptance.

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[11] A criminal statute that "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute," *United States* v. *Harriss*, 347 U.S. 612, 617 (1954), or is so vague and indefinite that "it encourages arbitrary and erratic arrests and convictions." *Papachristou* v. *City of Jacksonville*, 415 U.S. 156, 162 (1972). is void for vagueness. *Colautti* v. *Franklin*, 47 U.S.L.W. 4094, 4097 (January 9, 1979); see generally *Grayned* v. *City of Rockford*, 408 U.S. 104, 108–09 (1972).

In construing a companion to section 208. the Court of Appeals for this Circuit noted that the statute should be considered in terms of whether it provides fair warning to the persons in the setting to which it is directed. See *United States* v. *Brewster*, 165 U.S. App. D.C. 1, 506 F.2d 62 (1974).

Conflict of interest is not the sort of offense that is governed by the more relaxed standard of vagueness for economic crimes suggested in *United States.* v. *National Dairy Corp.*, 372 U.S. 29, 36 (1963).

258 F.2d at 424.

The dictionary definitions of negotiating are no less subject to serious confusion. Negotiating is defined as either "communicat[ing] or confer[ring] with another so as to arrive at the settlement of some matter," or "carrying on business or trade." Webster's Third New International Dictionary, *supra* at 1514. The first definition would appear to require proof of communicating with the *purpose* or *goal* of reaching a settlement, whereas under the latter, proof of any discussion about the subject of employment would establish the "negotiating" element of the crime. These distinctions, which arise simply from the choice of one common definition or another, have substantially different practical consequences that in the context of section 208 might trigger criminal liability for otherwise innocent and constructive government service.

Yet the statute does not make clear nor did the indictment advise the Court or the defendant which of these definitions, if any, the Government intended to import into it; the proposed instructions are not binding and can be amended to conform to the proof. According to the proposed instruction, an arrangement entails a "plan or agreement." The Bill of Particulars, purportedly detailing the existence of an arrangement, alleged first that an arrangement existed as early as December 7, 1976. Yet, later in the same paragraph, the Particulars stated that "[t]he defendant admitted discussing employment with Edward Weitzen on or about June 10, 1977 and *soon thereafter agreed* to work for ABN." Bill of Particulars, October 4, 1979, at ¶ 7. The necessary implication of the last sentence is that the agreement—and consequently, according to one element of the proposed instruction, the "arrangement"—did not come into being until *after* June 10, 1977, although the indictment and the Particulars allege that it existed at some unstated time before December, 1976. Assuming that the Bill was intended to support, not contradict, the indictment, the only conclusion is that the Government has at least two theories of what constitutes an "arrangement," only one of which is fairly reflected in the proposed instruction. Similarly, although the Government defines "negotiating" as entailing "submitting and considering offers," they identify only a single discussion, on June 10, 1977, while maintaining that the defendant was negotiating from at least December, 1976, onwards. *See* Bill of Particulars, *supra*, at ¶ 6. If the Government cannot reconcile its understanding of "arrangement" and "negotiating" with the indictment and the Bill of Particulars, it is difficult to understand how these terms can be said to give the defendant or the Court the warnings which the Constitution requires.

At oral argument on the motion to dismiss, the Government suggested other definitions of "arrangement" and "negotiating" that might avoid these inconsistencies and remove the Constitutional problem. The Government suggested that the terms describe inchoate "stages" or "states" that have abstract existence, but do not require any concrete acts such as discussions, communications, or bilateral agreements. Thus, the Government suggested that an offer by an organization to a government employee would create a state of "negotiating" unless and until the employee affirmatively rejected the offer. It would not, for example, require continuing discussion, nor would it permit the process of "negotiating" to lapse without some definite act. Such an interpretation, while it might succeed in encompassing the acts of defendant Conlon, would substitute other obvious and serious problems of vagueness for those it sought to cure.

Ultimately, the Government has suggested that its broad definition of the term "arrangement" should not be considered overly vague in light of the courts' acceptance of broad, imprecise definitions of the term "agreement" in the context of conspiracy law. While it is true that the object of conspiracy law is to punish agreements, *see United States* v. *Feola*, 420 U.S. 671, 694 (1975); *Rabinowich* v. *United States*, 238 U.S. 78 (1915), and that the term has, in that context, been held to have a sufficiently fixed meaning, *see Crawford* v. *United States*, 30 App. D.C. 1, 12 (1907), *rev'd on other grounds*, 212 U.S. 183 (1909), there are important differences in the two contexts that emphasize the deficiencies of the terms in section 208(a).

To begin with, conspiracy is an offense well known at common law, and the term agreement in a conspiracy is a term of art that has a reasonably well-defined and settled meaning known to potential defendants and to the courts. It is this historical evolution of the concept of an agreement that makes the term constitutionally acceptable. *Crawford* v. *United States*, *supra*.[12] Precisely this history is lacking in section 208, which was enacted by Congress less than 20 years ago to replace a statute in which the terms "arrangement" and "negotiating" did not appear.[13] No reported decision construes these terms.

More importantly, the punishment of agreements by conspiracy laws is saved from vagueness by several important limitations that are absent from the interpretation the Government offers for section 208(a). First, because agreement is an inchoate concept, it is well established that the Government must prove that the defendant entered into the agreement with specific intent to carry the project to completion. *See* 18 U.S.C. § 371; *United States* v. *Crimmins*, 123 F. 2d 271 (2d Cir. 1940) (L. Hand, J.); *People* v. *Mader*, 313 Ill. 277, 145 N.E. 137 (1924) (common law); M. Bassiouni, Substantive Criminal Law 215–16 (1978). By contrast, the Government has contended here that a violation of section 208 may be established on the basis of general intent. *See* Government's Memorandum About 18 U.S.C. § 208, October 2, 1979, at 9–12 ("Specific criminal intent or a conscious purpose of wrongdoing is not an essential element of Section 208").[14]

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[12] Analogously, the Supreme Court has been able to give content to the terms "advocate" and "teach" because, in the context of a criminal prosecution, they were "already construed as terms of art carrying a special and limited connotation." *Yates* v. *United States*, 354 U.S. 298, 319 (1957). Similarly, one of the grounds upon which the Court in *United States* v. *National Dairy Corp.*, *supra*, relied in holding that section 3 of the Robinson-Patman Act, 15 U.S.C. § 13a, was not impermissibly vague was that the terms there at issue had "meaningful referent[s] in business or practical usage." 372 U.S. at 36. See also *United States* v. *Reid*, 533 F.2d 1255, 1264 (D.C. Cir. 1976) (tradition gives content to concept of fraud).

[13] The history of section 208 and the provenance of the terms "arrangement" and "negotiating" are discussed *infra* at 13–16 and note 31. It is well established that particular care must be taken in defining new criminal offenses. *Connally* v. *General Constructon Co.*, 269 U.S. 385, 391 (1926); see *Scarbeck* v. *United States*, 115 U.S. App. D.C. 135, 317 F. 2d 546, 556 (1962), *cert. denied*, 374 U.S. 856, *rehearing denied*, 375 U.S. 874 (1963).

[14] The Government may well be correct in asserting that section 208 requires only general intent. However, the absence of a requirement of *mens rea* may be a persuasive reason either to find the statute impermissibly vague or to construe it more narrowly than if specific intent were an element of the crime. As the Supreme Court noted last term in Colautti v. Franklin, 47 U.S.L.W. 4094, 4098 (Jan. 9, 1979): "This Court has long recognized that the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of *mens rea*."

Second, an indictment charging a conspiratorial agreement must be manifested by an overt act.[15] By contrast, the Government claims here that an "arrangement" triggering the sanctions of section 208 may be demonstrated without proof of any concrete acts manifesting its existence. Thus, neither the indictment nor the Bill of Particulars here allege any specific acts or statements purporting to constitute negotiating or arranging.[16]

Finally, the breadth of conspiracy law derives from the supposed danger of secret combinations to break the law, see *Ianelli* v. *United States*, 420 U.S. 770, 778–79 (1975); *Callanan* v. *United States*, 364 U.S. 587, 593–94 (1961); *Rabinowich* v. *United States*, *supra*, 238 U.S. at 78. By contrast, the Government does not allege a combination here, nor is the prospective employer charged with any offense. Nothing in the statute as construed by the government would require bilateral negotiations or a bilateral arrangement to create criminal liability. Ironically, according to the Government's construction, a charge for conspiracy to violate section 208(a) would require more substantial and detailed allegations and proof than would a charge under section 208 itself.

Even if legislative history could be incorporated by reference to give meaning to the terms "arrangement" and "negotiating," the elusiveness of the terms would still give pause. The terms first appeared in federal conflict of interest law in 1962. In enacting section 208, Congress added "any person or organization with whom he is negotiating or has any arrangement concerning prospective employment" to the list of outside connections prohibited to a Federal employee transacting official business with that person or organization.[17] The predecessor of section 208, 18 U.S.C. § 434, had barred dealings by a federal employee only with an organization of which he is "an officer or member of, or directly or indirectly interested in the pecuniary profits or contracts." Although the 1962 statute evinces a clear purpose to expand the prohibited connections with outside organizations related to employment,[18] the legislative history is completely silent as to what an arrangement or negotiation might entail.[19] Thus, the House Report accompanying H.R. 8140, of which section 208(a) was a part, stressed the need to expand section 434 to prohibit government employees from participating in a matter of interest to, *inter alia*, a "prospective employer." [20] But the section analysis of the provision fails to define or discuss when or how the connection with a prospective employer becomes impermissibly close.[21] Thus, the legislative history provides none of the definition which might possibly cure the statute's vagueness.

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[15] 18 U.S.C. § 371; *see* Fiswick v. United States, 329 U.S. 211, 216 (1946); Braverman v. United States, 317 U.S. 49, 53 (1942); Note, *Developments in the Law—Criminal Conspiracy*, 72 Harv. L. Rev. 920, 948 (1959).

[16] The Government has characterized the June 10, 1977, meeting with an ABN official, which defendant has admitted, and which was included in the Bill of Particulars at ¶¶ 6, 7, as "surplusage" and not an overt act of arranging or negotiating.

By contrast, the overt acts alleged in an indictment for conspiracy may provide substantial detail about when, where, and under what circumstances the alleged agreement arose. Thus, in upholding an indictment for conspiracy, this Court of Appeals drew attention to particular allegations contained in the overt acts as helping to put the defendants on notice of the charges against them. United States v. Haldeman, 181 U.S. App. D.C. 254, 559 F.2d 31, 120–21 (1976), *cert. denied sub nom.*, Ehrlichman v. United States, 431 U.S. 933, *reh. denied,* 433 U.S. 916 (1977).

[17] The addition of the terms "arrangement" and "negotiating" is discussed in the House Report accompanying H.R. 8140, 87th Cong., 1st Sess., which was subsequently enacted and codified at 18 U.S.C. *See* H. Rep. No. 748, 87th Cong., 1st Sess. 13 (1961) [hereinafter House Report]; S. Rep. No. 2213, 87th Cong., 2d Sess. (1962) [hereinafter Senate Report]; note 31, *infra*.

The Memorandum of the Attorney General Regarding Conflict of Interest Provisions of Public Law 87–849, 28 Fed. Reg. 985, 988 (1963), merely paraphrases the terms of the statute, noting that it forbids an employee from participating officially in a matter of financial interest to an organization "with which he is connected or is seeking employment. . . ."

For a discussion of the history and terms of the 1962 conflict of interest statute, see generally B. Manning, Federal Conflict of Interest Law (1964); Perkins, *The New Federal Conflict-of-Interest Law,* 76 Harv. L. Rev. 1113, 1130–34 (1963).

[18] *See* House Report, *supra,* note 17, at 13; Perkins, *supra,* note 17, 76 Harv. L. Rev. at 1133. Both section 434 and section 208 prohibit financial interests and "status" connections—such as employment—with outside organizations with respect to which the federal employee is also participating in an official capacity.

There is no allegation that the defendant had any prohibited financial interest in ABN, and the Court is concerned only with the "status" connection of "arrangement" or "negotiating" for prospective employment.

Section 208(b),[22] which provides an employee in jeopardy under section 208(a) an opportunity to obtain an advance determination of the permissibility of his actions, fails to save section 208(a) from vagueness. Although the section was plainly addressed at the potential unfairness of the unusually broad reach of section 208(a),[23] the provision cannot be relied on to give content to terms otherwise without fixed meaning. Section 208(b) is addressed to the disclosure of a government official's financial interests in outside organizations, not connections with such organizations arising from present or prospective employment.[24] Section 208(b) provides that the official may make an advance "disclosure of the financial interest" and receive a written determination of whether it is "so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from such officer or employee." 18 U.S.C. § 208(b). Section 208(b) contains no similar provision for a determination of whether the official's contacts with a prospective employer are impermissibly close, nor is there any evidence that section 208(b) was designed to reach such questions. More fundamentally, to make fruitful use of section 208(b) an employee must first know that he is in peril under section 208(a). If its provisions are without plain meaning, the protection afforded by section 208(b) is relatively meaningless.[25]

B

In considering section 208, however, the Court is, as the Government implicitly suggests, guided by two general principles: first, courts should refrain from passing on the constitutionality of a statute unless it is absolutely necessary;[26] and, second, where a precise and narrow judicial interpretation may save a statute from impermissible vagueness, that interpretation should be employed.[27]

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[19] *See* 14–16, *infra*. The history of the 1962 conflicts reform is summarized in *Perkins*, *supra*, note 17, 76 Harv. L. Rev. at 1113–17.

[20] House Report, *supra*, *note* 17, at 13.

[21] *Id.* at 14.

[22] Section 208(b) is set out in full at note 2, supra.

[23] The House Report, supra, note 17, notes that section 208(b) was included because "it is unfair to require the government employee to act at his peril in drawing the line between substantial and trivial interests . . . ."

[24] See id. at 24:

"[Section 208(b)] provides a system whereby the Government may utilize the services of its employees in situations in which under the present law a de minimis financial interest in a matter may . . . compel disqualification under criminal penalties."

[25] Section 208(b)(2) also provides for exemption of a "financial interest" by general rule or regulation if it is "too remote or too inconsequential to affect the integrity of the Government officers' or employees' services." 18 U.S.C. § 208(b)(2).

Executive Order 11.222, 30 Fed. Reg. 6469 (1965), as amended by Executive Order 11.590, 36 Fed. Reg. 7831 (1971), delegates authority under Section 208(b) to the appropriate agency head. However, the Treasury Department regulations governing defendant's conduct do not construe the terms "arrangement" or "negotiating"; they simply state that a government employee may not participate substantially in a matter of financial interest to an organization of which "he is an employee or prospective employee." 31 C.F.R. § 0.735–21 (e) (1978). If anything, this description is less precise than that found in section 208 itself.

The conflict of interest disclosure provisions of Executive Order 11.222 do not require disclosure of negotiations or arrangements with prospective employers, although they do require disclosure of all existing connections with outside business organizations. See Executive Order 11,222, at § 401(a)(1)(A).

The Court finds that such a narrowing construction is available for section 208(a) by construing "negotiating" to require allegations of specific acts of negotiating by the defendant in concert with a prospective employer; and by construing "arrangement" to require allegations of specific bilateral arrangements or acts of arranging. Such a construction, while consistent with a conclusion that the statute is constitutional, requires dismissal of the indictment here for failure to charge conduct proscribed by the statute as construed.

This interpretation of the terms of section 208(a) is consistent with the multiple purposes of the 1962 amendments to the federal conflict of interest laws. In enacting the general reform of the federal bribery, graft and conflict of interest laws, Act of October 23, 1962, Pub. L. No. 87-849, 76 Stat. 1119 (codified at 18 U.S.C. §§ 201–224), the Congress expressed three distinct purposes:

> (1) to strengthen, revise, and simplify existing Federal conflict-of-interest laws, (2) to make appropriate general provision for consultants and temporary employees in the executive branch . . . and (3) to integrate these conflict-of-interest laws with recodified prohibitions of bribery and graft—all to the end that improper and unethical practices will be prevented without depriving the Government of the services of competent and conscientious men and women.[28]

Although the need to eliminate loopholes in the existing law was stressed,[29] even more attention was paid to the need for avoiding restrictions that would expose government employees unfairly to criminal punishment and, in the long run, deprive the federal government of the services of able men and women.[30]

The drafting of section 208(a) reflects attention to both of these policies. The principal portions of section 208, including those here at issue, had their genesis in a report of the Association of the Bar of New York, Special Committee on the Federal Conflict of Interest

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[26] See, e.g., *United States* v. *Rumely,* 345 U.S. 41, 48 (1953); *Rescue Army* v. *Municipal Court,* 331 U.S. 549, 568 (1946).

[27] See e.g., *United States* v. *Harriss,* 347 U.S. 612, 618 & n. 6 (1954); *Screws* v. *United States,* 325 U.S. 91, 98 (1945) (plurality opinion); *Ashwander* v. *Tennessee Valley Authority.* 297 U.S. 288, 348 *rehearing denied,* 297 U.S. 728 (1936).

[28] House Report, supra note 17 at 2.

[29] The House Report noted that the existing law "fails to proscribe participation in matters in which . . . [a] prospective employer has a financial interest." House Report, supra note 17. at 13. See also id. at 2 ("The consensus of public expressions on the subject has criticized existing Federal legislation in this area as inadequate and confused."). Significantly, however, the problems addressed by the addition of the prohibitions against an "arrangement" or "negotiating" with a prospective employer were not among those highlighted by the Committee in reviewing the principal deficiencies in the existing law. See id. at 4.

[30] See id. at 2–7. The problem was also addressed by the President in a message to Congress on proposed revisions to the conflicts laws. The President noted that existing laws permitted, on the one hand, incompatible interests on the part of public employees, and "on the other hand, they create wholly unnecessary obstacles to recruiting qualified people for Government service. This latter deficiency is particularly serious in the case of consultants and other temporary employees, and has been repeatedly recognized by Congress in its enactment of special exemption statutes." Message from the President of the United States. H. Doc. No. 145. 87th Cong., 1st Sess. 3 (1961). The Senate Report on the Bill is similar, noting that the purposes of the Bill are first to simplify and strengthen existing laws, and, second, "in the interest of facilitating the Government's recruitment of persons with specialized knowledge and skills for service on a part-time basis, it would limit the impact of those laws on the persons so employed without depriving the Government of protection against unethical conduct on their part." Senate Report, supra note 17, at 4.

Laws.[31] In noting the need to expand section 434 to cover conflicts with prospective employers, the Committee noted:

> [G]overnment employees who anticipate leaving their agency some day are put under an inevitable pressure to impress favorably private concerns with which they officially deal.... The risk is not bribery through the device of job offers; the risk is that of sapping governmental policy, especially regulatory policy, through the nagging and persistent conflicting interests of the government official who has his eye cocked toward subsequent private employment.

Bar Report, *supra*, at 234. Although the Committee expressed its concern for the seriousness of the problem, it conceded that it was "virtually impossible to solve," and noted that—

> One of the costs of a flexible and interflowing penetration of the private and public economy is that people will often have an eye ahead for the next move. We derive many benefits from the process of personnel flow in and out of government. If we are to continue to enjoy such benefits of our system—and they are very great—we must be prepared to pay some small price.

Id. at 235. These dual concerns reflect a desire to balance the need to protect the Government from the conflicting interests of the employee with "his eye cocked" toward future private employment against a recognition of the importance of the free flow of talent between the private and the public sector. To this calculus must be added the Committee's concern that the vagueness of the existing laws exercised an undesirable deterrent effect on the ability of government to recruit talented and ambitious personnel. *Id.* at 163.

These countervailing concerns were reflected in Congressional consideration of the reform of section 434. Section 208 was designed to expand its predecessor in important respects, while at the same time including the section 208(b) mechanism in order to exclude insubstantial financial interests from statutory prohibition.

Congress plainly intended that prohibiting the participation by Government employees in decisions affecting organizations with whom they are "negotiating or [have] any arrangement concerning prospective employment" would expand the reach of the former statute.[32] At the same time, however, Congress shared the concern of the Bar Association Committee for permitting qualified persons to move between the public and private sectors.[33] Indeed, in describing the purposes of the bill subsequently enacted, the Senate Report referred to the "dual objectives [of the bill] of protecting Government integrity and facilitating the Government's recruitment and retention of needed personnel." Senate Report, *supra*, at 7. To penalize by criminal prosecution indefinite and inchoate links to outside firms such as unsolicited offers of future employment or even unilateral hopes or plans could defeat this Congressional purpose.

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[31] Association of the Bar of New York, Conflict of Interest and the Federal Service (1960) [subsequently published in hardcover under that title] [hereinafter Bar Report]. For the relationship of the Bar Association report and recommendations to the reform bill, see generally Perkins, supra note 17, at 76 Harv. L. Rev. 1114–17: House Report, supra note 17, at 7–8.

The proposal to expand section 434 to include government officials who have an "arrangement" or who are "negotiating" with a prospective employer first appeared in the Bar Association's Proposed Act as section 3(b)(4). See Bar Report, supra. at 279–80. The Proposed Act was introduced in the 87th Congress, 1st Session, as H.R. 3050 and S. 603. See Perkins, supra note 16, at 76 Harv. L. Rev. 1116 n. 14. The texts of the three Bills (H.R. 3411. 3050. and 7139) that formed the core of H.R. 8140 are set out in Hearings Before the Antitrust Committee of the House Committee on the Judiciary, 87th Cong., 1st Sess., ser. 3, at 4–25 (1961).

[32] *See* note 29, *supra*.

[33] *See* note 30, *supra*. The need for specificity is particularly acute in view of the prevalent concern for part-time employees or special consultants. *See, e.g.,* House Report, *supra* note 17, at 3–7; Senate Report, *supra* note 17 at 6–7. These persons, later defined by the statute as special employees, *see* 18 U.S.C. § 202, and included within section 208, clearly contemplate a return to the private sector after a short stint in government service.

The scope of the prohibition against connections with outside interests related to employment should also be read in *pari materia* with similar prohibitions in section 208 of outside financial interests. Although section 208(a) prohibits a government employee from participating substantially in a matter in which he has any "financial interest," section 208(b) makes clear that insubstantial interests are to be exempted.[34] A broad reading of "arrangement" or "negotiating" would punish personal affiliations with organizations that would not be culpable if the affiliations were, instead, pecuniary. Assuming that Congress intended to treat consistently affiliations with a similar potential for influencing an employee's integrity and impartiality, the prohibitions in section 208(a) related to employment should not be interpreted to reach insubstantial contacts or connections. Yet, unless the statute is construed to require specific allegations about bilateral negotiating or arranging, the statute could be stretched to punish criminally the most insubstantial contacts.[35]

This stricter construction of section 208 also comports with a longstanding Congressional view that criminal penalties should be applied with care to the difficult area of conflicts of interest. Indeed, a recent commentator has identified a growing consensus that the problems of conflict of interest are most appropriately addressed through administrative regulation, disclosure, and post-employment limitations rather than criminal penalties.[36] For example, the proposed revision of the criminal code,[37] including earlier versions of the bill proposed by the Justice Department,[38] would, if enacted, eliminate section 208 as a criminal offense and make it subject, instead, to administrative regulation. According to a recent study, at least one important reason for the proposed decriminalization of the conflict offenses is that "definition of conflict-of-interest standards poses substantial problems in a government heavily involved in private sector regulation . . ."[39]

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[34] See notes 23–24, supra ; Senate Report, supra note 17, at 14 ("Subsection (b) adopts a de minimis rule" for "insignificant" interests).

[35] Interpreting section 208 to require concrete acts is also consistent with other provisions enacted by Congress as part of its overall reform. Thus, section 209, which prohibits federal employees from supplementing their salaries from certain private sources, replaced a former bar on any payments "in connection with" government service with the more precise prohibition against salaries paid "as compensation for" governmental acts. 18 U.S.C. § 209 ; House Report, supra note 17, at 13. Even more specifically, the new statute made clear that certain benefits, such as pension, retirement, and group health plans, were not prohibited. Id. Similarly, the prohibitions on certain post-employment dealings with the Government were expressly clarified to require that the matter have been the "official responsibility" of the former employee while in Government service. Id. at 11. The term "official responsibility" was given precise and narrow meaning in 18 U.S.C. § 202(b).

[36] See R. Vaughn, Conflict-of-Interest Regulation in the Federal Executive Branch 25–28 (1979).

[37] See id. at 22. The most recent version of the criminal code reform is S. 1437, 95th Congress, 1st session (1977) ; see S. Rept. No. 95–605, 95th Congress, 1st session, pt. 1, 383–424 (1977) (proposed revisions of bribery and conflict of interest provisions).

[38] The Bill drafted by the Criminal Code Unit of the Justice Department was introduced by Senator Hruska as S. 1400, 93d Congress, 1st session. See 119 Cong. Rec. 9664 (1973) (remarks of Senator Hruska).

[39] See R. Vaughn, supra note 36, at 26.

By themselves, these proposed changes plainly do not affect the interpretation of section 208. However, as the study noted, the proposed decriminalization reflects a concern for the indiscriminate application of criminal penalties first expressed by Congress in passing the 1962 reforms. The study noted that:

> In any area where standards are ambiguous and need to be subtly developed in the very process of enforcing them, the criminal sanction prevents their development and growth . . . [C]riminal proceedings do not provide a forum to test standards, apply new ones, or to modify the old. The criminal proceedings are rightly not the forum for experimentation, for conflict of values, and for the development of new standards and criteria.[40]

Or, as the 1962 Bar Association Report put it more bluntly:

> unlike the policy makers of the nineteenth century, we no longer are forced to cope with subtle problems of personal conduct bearing only a potential of harm with the same legal poleax we use against murder, arson, and treason.[41]

A construction of the statute as requiring allegations of specific acts, occasions or events showing the existence of an arrangement or an ongoing process of negotiating for employment should carry out the will of Congress as expressed in 1962 consistently with constitutional requirements.

In reaching this conclusion, the Court has considered the Government's references to the sweeping language of the Supreme Court in *United States* v. *Mississippi Valley Generating Company*, 264 U.S. 520 (1961), to support a broad definition of terms. There, the Supreme Court construed section 434's prohibition against participation by a government employee in an action in which the outside organization with which he was connected had an "indirect financial interest." In *Mississippi Valley*, there was no question about the government employee's connection with the outside organization. He was an officer. 364 U.S. at 523. The issue was the nature of the financial interest of the organization in the outcome of the government decision. The Court held that the probability that Company B's being chosen to arrange the financing for a project if Company A received a government contract constituted an indirect interest in the contracts of Company A. *See* 364 U.S. at 555–57.

The Government points to the Supreme Court's statement in *Mississippi Valley* that section 434's "obvious purpose . . . is to insure honesty in the Government's business dealings," 364 U.S. at 548, as supporting a broad definition of the terms "arrangement" and "negotiating." But it is clear that either a broad or a narrow reading of these terms would help insure honesty: the abstract statement says nothing about how far that purpose is to be carried. Moreover, in passing the present section 208 nearly two years later, Congress plainly expressed a second, and in some respects conflicting, purpose of eliminating uncertainty and protecting both employees and the Government from the effects of overly broad restrictions.[42] In this respect, it is significant that in passing section 208, Congress conspicuously failed to use the elastic term "indirect financial interest" that the Supreme Court had construed broadly in *Mississippi Valley*. A prominent observer of the legislation, who participated in drafting the bill that contains the essential provisions of section 208, speculated that the effect of the new law "might well preclude" the result reached in *Mississippi Valley*.[43] Far from supporting the Government's position, the decision in *Mississippi Valley*, viewed in the context of the drafting of section 208, supports the conclusion that the statute's terms should be read narrowly to require clear and concrete acts before criminal penalties are imposed.

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[40] Id.

[41] Quoted at id. at 27. The later published version of the Bar Report eschewed the use of "the broad axe of criminal prohibition." Bar Report, supra, at 148.

C

It remains to determine the sufficiency of the indictment in light of the foregoing consideration of the section 208. It is clear that to be sufficient, an indictment must set out the material elements of the offense, *United States* v. *McBride*, 162 U.S. App. D.C. 141, 498 F.2d 683 (1974), and the factual allegations supporting them, Rule 7(c), Fed. R. Crim. P.; *Hamling* v. *United States*, *supra*, 418 U.S. at 117–18. Where the statute omits an essential element of the offense, *United States* v. *Carll*, 105 U.S. (15 Otto) 611 (1881), or the statute contains general or generic terms, *Russell* v. *United States*, 369 U.S. 749, 769 (1962); *United States* v. *Nance*, 174 U.S. App. D.C. 472, 533 F.2d 699 (1976), it is not enough for the indictment to allege that element merely by tracking the language of the statute. This requirement of specificity serves the purpose, *inter alia*, of "inform[ing] the Court of the facts alleged so that it may decide whether they are sufficient in law to support a conviction, if one should be had." *Russell* v. *United States*, *supra*, 369 U.S. at 769, *quoting United States* v. *Cruikshank*, 92 U.S. 542, 558 (1875).

This requirement is particularly relevant where the interpretation of the statute under which a defendant is charged poses difficulties and uncertainties. 369 U.S. at 769. Thus, the mere fact that the indictment in the instant case alleged the existence of an "arrangement" and that the defendant was "negotiating" is not sufficient. Without an allegation of specific events showing the existence of a bilateral agreement or ongoing events of negotiating, the indictment fails to state an offense under section 208(a).

This result is similar to that reached by our Court of Appeals in *United States* v. *Nance*, *supra*, which held that an indictment for false pretenses failed to state an offense where it identified the dates and the untruthfulness of the allegedly false representations, but did not allege any of the factual particulars of the false representations. 533 F.2d at 702. The Court of Appeals there noted that "[o]rdinarily, it is proper for an indictment to be drawn in the language of the statute, but following the generic wording of a statute is not necessarily sufficient." 533 F.2d at 701; see also *United States* v. *Thomas*, 144 U.S. App. D.C.

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[42] See note 30, supra. It is this second, countervailing concern that distinguishes the prohibitions against conflicts of interest, self-dealing, and postemployment contracts from those directed at bribery and graft. For this reason, the willingness of the Court of Appeals in *United States* v. *Brewster*, supra, 506 F.2d at 77, to construe broadly section 201(g), governing gratuities, is not relevant here.

[43] Perkins, supra note 17, 76 Harv. L. Rev. at 1134.

44, 444 F.2d 919 (1971). The failure to specify the representations, the Court stated, would allow the "United States Attorney . . . a free hand to insert a vital part of the indictment without reference to the grand jury," *id.*, and violate "basic principles of fundamental fairness that require a defendant to be apprised of the charges against him." *Id.*

This proposition is not affected by *United States* v. *McBride*, *supra*, relied upon by the Government in support of its claim that the indictment is sufficient. In *McBride* the Court of Appeals held that the failure of an indictment for escape to charge that the defendant's confinement was because of an arrest "on a charge of felony or conviction of any offense" did not render it defective. 498 F.2d at 685. In reaching this determination, the Court of Appeals found that the nature of the custody from which the defendant escaped was "not an 'element' of appellant's offense in the sense that it is an integral part of his *mens rea* or *actus reus*. Rather, it is a circumstance in which he committed his offense." 498 F.2d at 686. The nature of the custody from which the defendant escaped was important only in determining whether he would be charged with a misdemeanor or a felony and did not constitute an act by the defendant. In the present situation, by contrast, neither the participation by the employee in the government action nor his connection with the outside organization is itself culpable. Rather, it is the congruence of the two acts that gives rise to criminal liability. In short, they are both essential, material elements of the offense; each must be alleged and proved independently in order to convict the defendant of any offense. Nothing in the statute, its history, or plain logic supports a conclusion that one element is material while the other is only tangential and circumstantial.[44]

The same principles operate here. While it may be that evidence proffered by the government would enable a jury to infer that the defendant committed acts that would constitute "negotiating" or an "arrangement," the failure of the indictment to specify them deprives the defendant of an opportunity to defend against a specific charge about particular occurrences, and leaves the Court and the defendant unaware of whether any particular acts were considered by the Grand Jury in bringing its indictment. The prejudice to the defendant is particularly compelling here, where the defendant may be called upon to account for acts that took place at some unspecified time over an 18-month period. Although the Bill of Particulars specifies a discussion on June 10 that might constitute "negotiating" or an "arrangement," its inclusion in a Bill of Particulars cannot cure its absence from the indictment. *Russell* v. *United States*, *supra*, 369 U.S. at 770-71; *United States* v. *Nance*, *supra*, 533 F.2d at 701.

The Court therefore concludes that Count I must be dismissed for failure to charge an offense under section 208(a). It may be that some of the evidence in the Government's possession, such as evidence of the June 10, 1977, conversations about employment between the defendant and ABN, when combined with allegations about the defendant's substantial participation in the ABN proposal under consideration by the Government, may form the basis for allegations sufficient for a proper indictment, or the Government may obtain additional evidence from and about ABN. If so, the evidence could be submitted to a Grand Jury for the purpose of returning an indictment that shows on its face the existence of a concrete arrangement or specific acts of negotiating. As the Court stressed in its Order of October 15, 1979, the dismissal of the charge under section 208 is without prejudice to subsequent re-indictment in a form properly charging an offense under 18 U.S.C. § 208(a), as here construed.

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[44] It is difficult to discover any reason, except perhaps the availability (or unavailability) of proof, for the Government's willingness to specify in the indictment and the Bill of Particulars the time, circumstances, and substance of the alleged acts of substantial participation by the defendant in the AEN proposal, while at the same time maintaining that similar detail about the alleged "arrangement" or "negotiating" need be neither alleged nor proved.

Louis F. Oberdorfer,
United States District Judge.

October 26, 1979.

APPENDIX J

United States Court of Appeals
For the District of Columbia Circuit

(No. 79-2283)

UNITED STATES OF AMERICA, APPELLANT

v.

JAMES A. CONLON

Appeal from the United States District Court
for the District of Columbia

(D.C. Criminal No. 79-380)

Argued February 15, 1980

Decided April 16, 1980

G. Allen Carver, Jr., Attorney, Department of Justice with whom *Robert S. Tignor*, Attorney, Department of Justice was on the brief, for appellant.

Plato Cacheris with whom *Larry S. Gondelman* was on the brief, for appellee.

Before: WRIGHT, *Chief Judge;* BAZELON, *Senior Circuit Judge*, and WILKEY, *Circuit Judge.*

Opinion for the Court filed by *Senior Circuit Judge* BAZELON.

BAZELON, *Senior Circuit Judge:* James A. Conlon was charged in a four count indictment with three counts of false declaration before the grand jury [1] and one count of conflict of interest.[2] The district court dismissed all four counts. The government appealed. We affirm the dismissal of the false declaration counts, adopting the opinion of the court below insofar as it deals with them.[3] However, we reject the district court's analysis of 18 U.S.C. § 208(a),[4] and reverse the dismissal of the conflict of interest count. Our discussion will be confined to that count.

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[1] 18 U.S.C. § 1623(a) (1977).

[2] 18 U.S.C. § 208(a) (1977).

[3] *United States of America* v. *James A. Conlon* (D.D.C., Criminal No. 79-380, Sept. 28, 1979). Joint Appendix (J.A.) 314–18. We do not read the opinion below as preventing the government from filing perjury charges against the defendant in an indictment that is more precisely drawn. We note that there is no problem with the statute of limitations in this case. See 18 U.S.C. § 3282 (1976); see also 18 U.S.C. §§ 3288–89 (1976).

I. FACTS

Until July 1, 1977, appellee Conlon was the Director of the Bureau of Engraving and Printing. From that date, he has been the President of ABN Development Corporation, a subsidiary of the American Bank Note Company (ABN). Beginning in December, 1976, the Bureau of Engraving and Printing and the Federal Reserve Board were entertaining the possibility of substituting a security signature system for United States currency developed by the American Bank Note Company for a similar system which they had been developing themselves. The government contends that, from December 1976 through June 1977, Conlon participated substantially in the decision-making process regarding this proposed replacement system. It further contends that, during the same period, he was negotiating and had an arrangement concerning prospective employment with the American Bank Note Company. Based upon these contentions, the government sought and obtained a grand jury indictment charging Conlon with violation of 18 U.S.C. § 208(a),[5] the conflict of interest law. The indictment read:

> In the period from on or about December 1976 through June 1977, in the District of Columbia, James A. Conlon, the Defendant, being an officer and employee of the executive branch of the United States Government, that is, the Director of the United States Bureau of Engraving and Printing, unlawfully and knowingly did participate personally and substantially as such officer and employee, through decision, recommendation, and the rendering of advice, in a proposal of the American Bank Note Company for a Security Signature System for U.S. Currency, a particular matter in which to his knowledge the American Bank Note Company, a company with which he was negotiating and had an arrangement concerning prospective employment, had a financial interest.[6]

The trial judge denied Conlon's motion to dismiss the indictment,[7] and granted his motion for a bill of particulars.[8] In that bill, Conlon sought the following information regarding the conflict of interest charge:[9]

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[4] *United States of America v. James A. Conlon* (D.D.C., Criminal No. 79–380, Oct. 20, 1979). J.A. at 367–97.

[5] 18 U.S.C. § 208(a) provides in relevant part:

". . . whoever, being an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, a Federal Reserve bank director, officer, or employee, or of the District of Columbia, including a special government employee, participates personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest or other particular matter in which, to his knowledge, he, his spouse, minor child, partner, organization in which he is serving as officer, director, trustee, partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest—

"Shall be fined not more than $10,000 or imprisoned not more than two years, or both."

[6] J.A. at 1.

[7] J.A. at 314.

[8] J.A. at 319.

(1) Whether the government was alleging that he had made a recommendation. If so, the date, content and form (written or oral) of the recommendation.

(2) Whether the government was alleging that he had rendered advice. If so, the date, content and form (written or oral) of the recommendation.

(3) Whether the government was alleging that he had made a decision. If so, the date, content and form (written or oral) of the decision.

(4) The date or dates upon which the government was contending that he had negotiated with ABN, including where and with whom the negotiations took place and the substance of the negotiations.

(5) The date or dates upon which the government was contending that he had an arrangement concerning prospective employment with ABN, including whether the arrangement was written or oral, whether a date for the prospective employment had been set, and with whom and where such arrangements were made.

The government responded in detail to the first three inquiries. It listed seven dates—December 7, 1976; December 22, 1976; April 21, 1977; May 10, 1977; May 17, 1977; June 21, 1977; and June 24, 1977—on which Conlon allegedly made recommendations and rendered advice concerning ABN's proposal. It listed four dates—December 7, 1976; April 21, 1977; May 10, 1977; and June 24, 1977—on which he allegedly made a decision affecting the proposal. It set forth the content of the putative recommendations, advice, or decisions. And, in several instances, it attached letters signed by Conlon which allegedly contained a recommendation, advice, or a decision.

The government's response to the fourth and fifth inquiries was more scanty. In response to the inquiry regarding negotiations, it said:

> The Government alleges that the defendant was negotiating with ABN on December 7, 1976; December 22, 1976; April 21, 1977; May 10, 1977; May 17, 1977; June 21, 1977; and June 24, 1977. We do not know when or with whom such negotiations were begun. The defendant has admitted discussing employment with Edward Wietzen on or about June 10, 1977, and soon thereafter agreed to work for ABN.[10]

Its response to the inquiry regarding arrangements was essentially the same:

> The Government alleges that the defendant had an arrangement for employment with ABN on December 7, 1976; December 26, 1976; April 21, 1977; May 10, 1977; May 17, 1977; June 21, 1977; and June 24, 1977. We do not know where or with whom the arrangement was made nor do we

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[9] J.A. at 11–12

[10] J.A. at 323.

> know when it began, whether it was written or oral, or whether a date for employment has been arranged. The defendant has admitted discussing employment with Edward Weitzen on or about June 10, 1977 and soon thereafter agreed to work for ABN.[11]

After receiving the government's bill of particulars, Conlon renewed his motion to dismiss the conflict of interest count,[12] arguing that the government had not properly alleged the existence of negotiations or arrangements.[13] At oral argument on the motion, the government offered some of the evidence it expected to present at trial to prove the existence of negotiations or arrangements. The essence of this evidence was (1) that in November, 1976, Conlon had met with a real estate broker (and later with an office space planner) regarding office space for ABN, and (2) that, in the course of those meetings, he had stated that he was going to be joining ABN and that the offices were going to be his.[14] The government noted that this issue had been been discussed extensively with Conlon before the grand jury.[15] It argued that, therefore, he was on notice as to the substance of the negotiations and arrangements charged. After considering the submissions of the parties, the trial judge granted Conlon renewed motion to dismiss the conflict of interest count.

In granting the motion, the district court held that a narrow construction of the terms "arrangement" and "negotiating" was necessary to save 18 U.S.C. § 208(a) from being unconstitutionally vague. On this basis, the court construed the statute to require the indictment to allege specific acts of negotiating by the defendant, or specific bilateral arrangements or acts of arranging. It then held that the indictment in the instant case failed to meet that standard.[16] This appeal followed.

II. ANALYSIS

(A) *The Construction of 18 U.S.C. § 208(a)*: The district court felt constrained to read 18 U.S.C. § 208(a) narrowly in order to save it from being unconstitutionally vague. It purported to do so with the following language:

> The Court finds such a narrowing construction is available for section 208(a) by construing "negotiating" to require allegations of specific acts of negotiating by the defendant in concert with the prospective employer; and by construing "arrangement" to require allegations of specific bilateral arrangements or acts of arranging.[17]

We find that it is not necessary to require the pleading of "specific acts of negotiating" or "specific bilateral arrangements or acts of arranging" in order to save § 208(a) from vagueness. In the context before us, the terms "negotiating" and "arrangement" are not exotic or obstruse words, requiring detailed etymological study of judicial analysis. They are common words of universal usage.[18] People of ordinary intelligence would have fair notice of the conduct proscribed by the statute. That there may be marginal cases is not sufficient reason to hold that a statute is too ambiguous to define a criminal offense.[19]

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[11] Id.

[12] J.A. at 339.

[13] J.A. at 340–42.

[14] Transcript (Tr.) of October 11, 1979, hearing on Motion to Dismiss Count One, at 77–79.

[15] See, e.g., J.A. 46–49, 55, 66, 146–47, and 174–76. Conlon admits that he spoke to the broker and space planner for ABN, and that he occupies the office space now. He says, however, that he did not make the statements concerning prospective employment that the government attributes to him. He claims that he was investigating the office space as a courtesy to ABN, a company that does extensive business with the Bureau of Engraving and Printing.

[16] *United States of America v. James A. Conlon* (D.D.C. Criminal No. 79–380, October 20, 1970) (hereinafter Memorandum Opinion). J.A. at 367–97.

[17] Memorandum Opinion at 13. J.A. at 379.

Thus, the narrowing construction imposed by the district court was not constitutionally required. Moreover, a narrow construction does not comport with the legislative history. The words of the statute must be read so as to effectuate the legislative purpose. This will often mean giving the words a broad, rather than a narrow, reading. As the Supreme Court put it over a century ago:

> The object in construing penal, as well as other statutes, is to ascertain the legislative intent. . . . The rule of strict construction is not violated by permitting the words of the statute to have their full meaning, or the more extended of two meanings, as the wider popular instead of the more narrow technical one; but the words should be taken in such sense, bent neither one way or the other, as will best manifest the legislative intent.[20]

Section 208(a) was enacted in 1962 as part of a general revision of the bribery and conflict of interest laws.[21] That version was prompted by "a growing concern, both in and out of Congress, with the ever present and perplexing problems of how best to assure high ethical standards in the conduct of the Federal Government." [22] Section 208 was crafted to "strengthen" [23] its predecessor section by adding, *inter alia*, a proscription against participation by an employee of the executive branch in matters of financial interest to a "prospective employer" [24] or "persons with whom he has business connections." [25] The words "negotiating" and "arrangement," as used in the statute, particularize the kinds of "business connections" encompassed by this provision.[26] In light of the legislative history of the provision, we must conclude that Congress meant the words "negotiating" and "arrangement" in § 208(a) to be given a broad reading, rather than the narrow reading accorded them by the district court.

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[18] It is noteworthy that the "narrowing" construction proposed by the district court does not narrow at all the meaning of "negotiating" or "arrangements." It merely requires the pleading of "specific acts" of whatever "negotiating" and "arrangements" are; it adds nothing to the content of the words. This indicates an understanding on the part of the district court of the two words used in the statute—for it uses them itself in its definition.

[19] *United States* v. *Petrillo*, 332 U.S. 1, 7 (1946). While we do not pass upon its applicability to situations of the type involved here, we note that the provisions of 18 U.S.C. § 208 (b) do provide a mechanism whereby an employee can obtain from his supervisor an exemption from § 208(a) for *de minimus* situations.

[20] *United States* v. *Hartwell*, 73 U.S. 385, 395–96 (1867). *See also United States* v. *Corbett*, 215 U.S. 233, 242 (1909).

[21] P.L. 87–849, 76 Stat. 1119 (October 23, 1962).

[22] H.R. Rep. No. 748, 87th Cong., 1st Sess. 2 (1962) (herein House Report). *See also* S. Rep. No. 2213, 87th Cong., 2nd Sess. 4–5 (1962) (herein Senate Report).

[23] House Report at 2, 13; Senate Report at 4, 13–14.

[24] House Report at 13.

[25] Senate Report at 14.

[26] We note in passing that the Congress that enacted § 208(a) had before it the comprehensive report of the Association of the Bar of the City of New York, *Conflict of Interest and Federal Service*—the report from which the language "any person with whom he is negotiating or has any arrangement concerning prospective employment" was drawn. *See* § 3(b)(4) of the Bar Association's proposed statute. Special Committee on the Federal Conflict of Interest Laws of the Association of the Bar of the City of New York, *Conflict of Interest and Public Service* 280 (1960). That report concluded:

"The risk is not bribery through the device of job offers; the risk is that of sapping governmental policy, especially regulatory policy, through the nagging and persistent conflicting interests of the government official who has his eye cocked toward subsequent private employment. To turn the matter around, the greatest public risks arising from post-employment conduct may well occur *during* the period of government employment. . . ."

Id. at 234 (italic in original).

(B) *The Adequacy of the Indictment in this Case:* An indictment is sufficient if it clearly informs the defendant of the precise offense of which he is accused so that he may prepare his defense.[27] The test for sufficiency is whether it is fair to require the accused to defend himself on the basis of the charge as stated in the indictment.[28] In some cases, it is enough if the indictment puts the charge in the words of the statute—but this is acceptable only where the statute itself fully, directly, and unambiguously sets forth all of the elements of the offense.[29] The more generally applicable rule is that the indictment may use the language of the statute, but that language must be supplemented with enough detail to apprise the accused of the particular offense with which he is charged.[30] This latter rule governs the case before us.

The indictment filed by the government in this case is by no means a model indictment. The government was niggardly in making the details of its case known to the defendant.[31] However, the adequacy of the indictment in this case must be assessed on its own merits, quite apart from whether or not it was a model.

It is clear that the government *could* have been more specific in the indictment. It provided some additional information in the bill of particulars, and it was even more concrete at oral argument on the renewed motion to dismiss. This casts doubt on the sufficiency of the indictment. And, it is settled that a bill of particulars—and *a fortiori* oral argument—cannot cure a defective indictment. Nonetheless, the sufficiency of the indictment "is not a question of whether it *could* have been more definite and certain."[32] Sufficiency depends upon whether it clearly informs the defendant of the precise offense of which he is accused so that he may prepare his defense.

Here, the charge indicated the identity of the company with which Conlon was allegedly involved, and the time frame in which the "negotiating" and "arrangements" exist. It is given that the "negotiating" and "arrangements" concerned prospective employment. The indictment also specified the project of interest to ABN (the signature security system) which was the subject of Conlon's attention. Taken together, this information was enough to give Conlon notice of the offense with which he was charged and to enable him to begin preparing a defense.[23]

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[27] *Russell* v. *United States,* 369, U.S. 749, 763–64 (1962); *United States* v. *Debrow,* 346 U.S. 374, 377–78 (1953).

[28] *United States* v. *Caldwell,* 544 F.2d 691, 694 (4th Cir. 1976); *United States* v. *McGhee,* 488 F.2d 781, 784 (5th Cir. 1974). See generally, 1 Wright, Federal Practice and Procedure § 125 (1969).

[29] *Hamling* v. *United States,* 418 U.S. 87, 117–19 (1974); *United States* v. *Debrow,* 346 U.S. 374, 376–78 (1953).

[30] *Russell* v. *United States,* 369 U.S. 749, 765 (1961); *Morissette* v. *United States,* 342 U.S. 246, 270 n.30 (1951); *Keck* v. *United States,* 172 U.S. 434, 437 (1898); *Blitz* v. *United States,* 153 U.S. 308, 315 (1893).

[31] The author of this opinion, speaking only for himself, notes in the literature a growing awareness of the need for openness by the government in criminal prosecutions. Laying aside entirely the question whether it is constitutionally required, a significant movement toward greater disclosure is taking place. State statutes have required it, trial judges are invoking their discretionary powers to effect it, and a growing number of prosecutors have made it standard practice. *See, e.g.,* Alderstein, *Ethics, Federal Prosecutors, and Federal Courts: Some Recent Problems,* 6 Hofstra L. Rev. 755, 759–73 (1978); Kampfe & Dostal, *Discovery in the Federal Criminal System,* 36 Mont. L. Rev. 189, 205 (1975); *Criminal Procedure—Discovery—Movement Toward Full Disclosure,* 77 W. Va. L. Rev. 561, 563 (1975); *Symposium, Discovery in Criminal Cases,* 45 F.R.D. 481 (1968); Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?* 1963 Wash. L. Q. 279, 285–87; *Datz, Discovery in Criminal Procedure,* 16 U. Fla. L. Rev. 163, 177 (1963); Krantz, *Pretrial Discovery in Criminal Cases: A Necessity for Fair and Impartial Justice,* 42 Neb. L. Rev. 127, 130–33, 1954 (1962). A criminal trial is not "a game or a sporting contest," but "a serious inquiry aiming to distinguish between guilt and innocence." Williams, *Advance Notice of the Defense,* 1959 Crim. L. Rev. 548, 554.

[32] *United States* v. *Debrow,* 346 U.S. 374, 378 (1953) (emphasis added).

The judgment of the district court is reversed as to Count I and affirmed as to Counts II, III, and IV.

So ordered.

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[23] The appellee argues that in the bill of particulars the government said that it did not know "when, where or with whom such negotiations were begun," or "where or with whom the arrangement was made." This additional specificity was not necessary to give Conlon the required notice, however.

The district court, for its part, relied on *United States* v. *Thomas*, 444 F.2d 919 (1971), and *United States* v. *Nance*, 553 F.2d 699 (1976), in support of its conclusion that this indictment was inadequate. This reliance was misplaced. The indictment in *Thomas* was impermissibly vague because it did not allege a fact that was a material element of the offense. The *Nance* indictment lacked any allegation whatsoever on a key element of the offense. There is a difference, of course, between failing to state an element of the offense and being less specific than one could be in spelling out the acts that constitute the offense.

APPENDIX L

United States District Court
For the District of Columbia

(Criminal No. 79-380)

Violation of 18 U.S.C. § 208(a) (Conflict of Interest)

UNITED STATES OF AMERICA

v.

RICHARD C. SENNETT, DEFENDANT

Superseding information

The attorney for the Government charges:

On or about July 28, 1977, in the District of Columbia, Richard C. Sennett, the Defendant, being an officer and employee of the executive branch of the United States Government, that is, an Assistant Director of the Bureau of Engraving and Printing, unlawfully and knowingly did participate personally and substantially as such officer and employee, through his recommendation that no Magna Press be returned to the American Bank Note Company, in a controversy regarding Magna Press modifications, a particular matter in which to his knowledge the American Bank Note Company, a company with which he had an arrangement for employment as an executive of ABN Development Corporation, had a financial interest.

In violation of Title 18, United States Code, Section 208(a).

Respectfully submitted.

G. ALLEN CARVER, JR., *Attorney.*

Public Integrity Section
Criminal Division
U.S. Department of Justice
Washington, D.C.

APPENDIX M

MANAGEMENT REVIEW OF THE BUREAU OF ENGRAVING AND PRINTING

STUDY TEAM

John M. Buck, Chairman, Office of Management and Organization.
Robert J. Beardall, Office of Computer Science.
Irving A. Fialkoff, Office of Audit.
Robert J. Howard, Office of Management and Organization.
Susan M. Hubbard, Office of Budget and Program Analysis.
Charles J. Schaefer, Office of Administrative Programs.

I. INTRODUCTION

A. PURPOSE

The purpose of this project was to make an overview of administrative management systems at the Bureau of Engraving and Printing (BEP) in order to report to top Treasury managers the status and effectiveness of these systems and what steps can be taken to further develop and improve them. The study team was directed to concentrate particularly on:

Financial management systems, to include methods of cost accounting and distribution of costs among products;

Plans and potential for application of ADP systems to management problems;

Techniques of pre-award audit and post-award administration of contracts, including measures to guarantee the physical security of food coupons produced under contract; and

Bureau organization overhead and productivity, including efforts to reduce overhead.

B. BACKGROUND

1. Bureau History

The Bureau of Engraving and Printing operates on authorities conferred by the Acts of July 11, 1862; March 3, 1877; and June 4, 1897; and additional authorities contained in past appropriations for completed and current work.

The Bureau designs models, engraves dies and manufactures most types of printing plates for production of United States currency, Federal Reserve notes, postage stamps, food coupons, revenue stamps, Treasury bonds, and other items of a financial character issued by the Government.

Since 1951, the Bureau has conducted its operations under a revolving fund method of financing established in accordance with Public Law 656, approved August 4, 1950. Client agencies reimburse the Bureau for all costs incidental to the manufacture of products and performance of services.

2. *Origins of the Current Study*

In the exercise of their oversight function with regard to the Bureau of Engraving, Treasury officials observed indications, during 1978, that there was a need to reexamine Bureau organization and management systems. Productivity was declining and overhead increasing; a Departmental audit report raised serious concerns about Bureau contracting practices; and the Bureau's top leadership was turning over. The Under Secretary of the Treasury therefore chartered this management overview, which was conducted during February and March 1979. The short time frame permitted only a general assessment and the identification of several areas for possible improvement which will need to be explored in greater depth.

II. SUMMARY OF FINDINGS AND RECOMMENDATIONS

CHAPTER V. FINANCIAL MANAGEMENT

Finding

Outmoded cost accounting systems distort product prices and fail to provide managers with useful information.

Recommendation

V–1. The only way to resolve the problem of outmoded cost accounting, and the ways in which it makes the Bureau vulnerable, is to introduce an automated system under which time and attendance, production reporting, and labor distribution are drawn from a single set of entries made daily and reconciled daily.

Finding

The present method of processing payroll inputs is cumbersome, expensive, and probably permits overpayment of employees.

Recommendation

V–2. This is further reason for the Bureau to move as rapidly as possible toward institution of an automated time and attendance/production reporting system (see recommendation V–1). The system would eliminate inaccuracies and the possibility of overpayment and would permit the one-time entry of *actual* payroll data on the Monday following the close of the pay period. It would thus eliminate the expensive payroll correction process, and would permit the Bureau to get along with many fewer clerical personnel in the cost centers.

CHAPTER VI. ADP APPLICATIONS

Finding

A coherent set of ADP applications, installed in order of priority, is badly needed to improve bureau management.

Recommendation

VI–1. The only way to break the cycle of deterioration in BEP's management information is for the new managers to make a vigorous effort to revive the ADP Steering Committee, to develop ADP two-year and five-year plans, and to start putting the pieces of an eventual automated management system into place in the order of their priority. To the extent that the knowledge and skills needed to do this are not available among Bureau personnel, they should be obtained from the Office of Computer Science and other Departmental staffs and/or outside help in the form of consultants and temporary employees.

CHAPTER VII. PROCUREMENT AND CONTRACT ADMINISTRATION

Finding

The great proliferation of procurement purchase orders causes massive clerical workload and processing expense.

Recommendation

VII-1. Although there was not time in this study to trace the intricacies of the procurement system, it is obvious that a thorough cost-benefit analysis is needed to assess the number of separate purchase orders, why they are issued, and how many items should appear on an individual order. The study should examine the policies and practices for distributing discrete costs among cost centers and the degree to which it is cost-effective to do so. Some items should be lumped into general overhead because they are not worth keeping track of individually. Other practices such as blanket purchase agreements for commonly-ordered items should be used, enabling Procurement personnel to call a vendor for small deliveries and pay cash using the Imprest fund. It seems reasonable to predict that a more rational and less expensive system could be devised.

Finding

Improvements are needed in Bureau procedures for awarding, administering, and auditing contracts.

Recommendations

VII-2. Closer review should be made of proposed contracts before award and better controls in contract administration should be instituted after award. Bureau internal auditors should expand audit coverage to include a broader spectrum of contracts and provide the contracting officer with more in-depth analysis of proposed contracts.

VII-3. The BEP contracting officer should request the internal auditors to perform cost and pricing reviews of all negotiated contracts over $100,000. If the auditors cannot perform this service because of limited resources, it should be obtained from the Departmental Office of Audit or from the Defense Contract Audit Agency, in accordance with Treasury Directive 70-06.

VII-4. Contracting personnel should set up procedures to review contracts more closely, prior to award, for any provisions which may subsequently be questioned and any errors which may have been made in the preparation of the contract.

VII-5. Accounting control over contract payments by the Office of Financial Management should be strengthened. OFM should program its accounting system to list any contract on which payments reach a certain predetermined percentage of the contract ceiling. This would serve as an instrument of internal control, allowing management to identify potential contract overruns and take any corrective action needed.

Findings

In the past, payments have been made for deliveries of food coupons without these deliveries having been certified by a Government representative. This undesirable practice has been stopped.

The ABN storage facilities are overcrowded and the inventory has not been managed in a way which permits accurate, up-to-date accountability.

The food coupon inventory is unbalanced, with minimum supplies of some denominations and excessive supplies of others.

There is a serious build-up of mutilated coupons awaiting destruction at ABN.

Recommendations

VII–6. BEP should continue its new practice of paying for coupon deliveries only after they have been certified by a Government representative.

VII–7. The Bureau should follow through on its effort to get ABN to clean out and reorganize its stock of finished food coupons, so that billings and shipments can be made by serial number and in sequential order, and the taking of inventory can be simplified.

VII–8. BEP should coordinate more closely with Agriculture and ABN to monitor the demand for different denominations of food coupon books and regulate their manufacture and delivery to inventory accordingly.

VII–9. The Bureau should continue to push ABN to find an alternate or supplementary means of destroying multilated food coupons which have accumulated at the ABN plant.

Finding

The physical security arrangements at the ABN seem adequate and it appears unlikely that simple pilferage could occur undetected on a significant scale.

Recommendation

VII–6. No action need be taken, other than for the Bureau to continue regular physical security inspections.

CHAPTER VIII. BUREAU ORGANIZATION, OVERHEAD AND PRODUCTIVITY

Finding

It appears that misalignment, duplication and overlap of functions may exist at BEP.

Recommendation

VIII–1. A study team should be established, under the direction of the Departmental Office of Management and Organization, to determine whether organizational problems exist which can be eliminated through restructuring.

Finding

Based on the information presented in this chapter and in the chapters on ADP applications and financial management, the study team believes that the entire overhead structure of BEP should undergo a thorough review.

Recommendation

VIII-2. The study of structure recommended above (Recommendation VI-1) should also include a workload analysis of the Bureau's overhead activities, to establish appropriate staffing levels, and the development of a staffing model to assist the Bureau to review and control these activities in the future.

Finding

BEP consistently utilizes large amounts of overtime to meet its production workload.

Recommendations

VIII-3. The positions saved by the overhead reduction program should be reallocated to reduce the use of overtime.

VIII-4. The use of work weeks other than Monday-through-Friday should be explored as a means of increasing the Bureau's capacity and reducing the amount of overtime.

Finding

The Bureau needs to improve its work measurement and productivity measurement systems.

Recommendations

VIII-5. The Bureau should establish a coordinated work measurement and productivity measurement system. The system should include development of accurate labor standards for use in planning and control of production, and in the development of standard labor costs and performance evaluation criteria. It should include performance reports which summarize data for appropriate levels of management.

VIII-6. The Bureau should review the standards being developed for overhead activities to insure that unnecessary detail is not required and that the standards accurately portray output.

Finding

BEP equipment justification practices need to be improved.

Recommendation

VIII-7. Thorough cost-benefit analysis, similar to those performed by the Industrial Engineering Branch, should be performed for *all* major equipment purchases. Where additional capacity is required, the costs of alternative methods for acquiring that capacity should be developed and the benefits of each determined in order to arrive at a supportable decision concerning the best alternative.

The Members of the Committee on Governmental Affairs, except those who are Members of the Senate Permanent Subcommittee on Investigations, did not sit in on the hearings and executive sessions on which the above report was prepared. Under these circumstances, they have taken no part in the preparation and submission of the report, except to authorize its filing as a report made by the Subcommittee.

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